# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1939**

## No. 230

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PETER J. CARPENTER, PETITIONER,

*vs.*

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, RECEIVERS, ETC., ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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**PETITION FOR CERTIORARI FILED JULY 26, 1939.**

**CERTIORARI GRANTED OCTOBER 9, 1939.**

# United States Circuit Court of Appeals

EIGHTH CIRCUIT.

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**No. 11,354**

**IN EQUITY**

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**PETER J. CARPENTER, APPELLANT,**

**vs.**

**WABASH RAILWAY COMPANY, ET AL., APPELLEES**

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.**

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**FILED NOVEMBER 5, 1938.**

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1939, of said Court, before the Honorable John B. Sanborn, the Honorable Seth Thomas and the Honorable Arba S. Van Valkenburgh, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the fifth day of November, A. D. 1938, a transcript of record pursuant to an appeal taken from the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Peter J. Carpenter was Appellant and the Wabash Railway Company, et al., were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 1] Notice of Appeal of Peter J. Carpenter.

(Filed Sept. 30, 1938.)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

T. J. Moss Tie Company, Complainant,

vs.

Wabash Railway Company, Defendant.

(Constituent Cause In Equity No. 9704.)

The Chase National Bank of the City of New York, as Trustee, Complainant,

vs.

Wabash Railway Company, Et Al., Defendants.

(Constituent Cause In Equity No. 12099.)

Central Hanover Bank & Trust Company, as Trustee under the First Mortgage of the Wabash Railroad Company, dated May 1, 1889, Complainant,

vs.

Wabash Railway Company, Et Al., Defendants.

(Constituent Cause In Equity No. 12357.)

In Equity No. 12099, Consolidated Cause.

Notice Is Hereby Given, that Peter J. Carpenter, who did, on January 26th, 1938, file in the above entitled Con-[fol. 2] solidated Cause, his Application For Leave To File in said Cause his Petition presented with, and attached to, said Application and entitled "Petition Of Peter J. Carpenter For Order Terminating Receivership of Wabash Railway Company and Dissolving Temporary Restraining Order and Injunction", hereby appeals to

the United States Circuit Court of Appeals for the Eighth Circuit from the orders, judgment and decree made and entered in the above entitled Consolidated Cause and Action, on August 31st, 1938, by the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and whereby the said District Court denied the said Application of Peter J. Carpenter for leave to file his said Petition and in effect refused an Order to wind up the pending receivership of Wabash Railway Company or to take the necessary steps to accomplish the purposes thereof, and continued the Temporary Injunction granted on December 1, 1931 and described in said Application and Petition, and refused the Application of said Peter J. Carpenter to dissolve said Injunction, and ruled and adjudged that the claim and judgment of said Peter J. Carpenter recovered by him in the Circuit Court of the City of St. Louis, Missouri, against Wabash Railway Company, and described in his said Application and Petition as, and had been correctly and finally determined to be, a general unsecured claim and not entitled to any lien or priority.

MARK D. EAGLETON,
HYMAN G. STEIN,
Attorneys for Peter J. Carpenter,
(Appellant).

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[fol. 3] Bill of Complaint.

(Filed Dec. 1, 1931.)

District Court of the United States for the Eastern Division of the Eastern District of Missouri.

T. J. Moss Tie Company, Complainant,
No. 9704. against In Equity.
Wabash Railway Company, Defendant.

To the Honorable The Judges of the District Court of the United States, for the Eastern District of Missouri:

T. J. Moss Tie Company, a Corporation duly created by and existing under the laws of the State of Missouri, a citizen of said State and having its principal office and place of business in the City of St. Louis in said State,

brings this its bill of complaint against Wabash Railway Company, a railroad corporation created by and existing under the laws of the State of Indiana, and having its principal operating and general offices and place of business in the City of St. Louis, in the State of Missouri, and shows unto Your Honors as follows:

First: That Complainant is a corporation duly organized and existing under the laws of the State of Missouri and a citizen and resident of said State, within the meaning of the laws fixing and defining the jurisdiction of this Honorable Court.

Second: That the defendant, Wabash Railway Company (hereinafter called the "Railway Company") is a railroad corporation organized and existing under the laws of the State of Indiana, and that its principal operating and general offices, as well as a substantial part of the railroads owned and operated by it, to wit: 652.35 miles thereof are located within the State of Missouri, its said principal operating and general offices being located at the City of St. Louis, in said State; and that said Railway Company is a citizen and resident of said State of Indiana, [fol. 4] within the meaning of the laws fixing and defining the jurisdiction of this Honorable Court.

Third: That the defendant Railway Company owns, possesses and operates certain lines of railroad in the States of Missouri, Iowa, Illinois, Indiana, Michigan, and Ohio, extending—

(1) From the City of Toledo, in a westerly direction into or through the Counties of Lucas, Fulton, Henry, Defiance, and Paulding, in the State of Ohio, and the Counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain, and Warren, in the State of Indiana, and the Counties of Vermillion, Champaign, Piatt, Macon, Sangamon, Morgan and Scott, in the State of Illinois, to Bluffs, in said State, and from Bluffs through Naples, in said County of Scott, to East Hannibal on the east bank of the Mississippi River in the County of Pike, State of Illinois, including all property of the Railway Company situate in the City of Hannibal, County of Marion and State of Missouri: from Bluffs into or through the Counties of Scott, Morgan, Pike, Brown and

Adams, in the State of Illinois, to Camp Point in said County of Adams; from Clayton into or through the Counties of Adams and Hancock, in the State of Illinois, to Elvaston on the east bank of the Mississippi River; from Decatur into or through the Counties of Macon, Christian, Montgomery, Macoupin, Madison and St. Clair, in the State of Illinois, to East St. Louis in said state; from Effingham into or through the Counties of Effingham, Shelby, Moultrie, Piatt, McLean, Champaign, and Ford, to Forrest, in Livingston County; in the State of Illinois, and through the Counties of Livingston and LaSalle from Fairbury to Streator in said State; from Altamont, in the County of Effingham, State of Illinois, to Shemway in said County; from Forrest through the Counties of Livingston, Kankakee, Will and Cook, in the State of Illinois, to or near the City of Chicago, in said State; from Edwardsville, Madison County, Illinois, to Edwardsville Crossing in said County; from Detroit, in the State of Michigan, in a westerly direction into or through the Counties of Wayne, Washtenaw, Monroe, and Lenawee, in the State of Michigan, and from [thense] into or through the Counties of Fulton and Williams in the State of Ohio, and into or through the County of Dekalb to Butler in the [fol. 5] State of Indiana; from the City of St. Louis, State of Missouri, by the way of North Market Street and Bellefontaine to Ferguson, in the County of St. Louis; from the Union Depot in the said City of St. Louis by the way of Forest Park to Ferguson and from thence in a northwesterly direction into and through the Counties of St. Louis, St. Charles, Warren, Montgomery, Audrain, Boone, and Randolph in the State of Missouri, to Moberly, in said State (including the bridge over the Missouri River at St. Charles) and from thence in a westerly direction into or through the Counties of Randolph, Chariton, Carroll, Ray, Clay, and Jackson in the State of Missouri to Kansas City in said State; from Brunswick in a northwesterly direction into and through the Counties of Chariton, Linn and Livingston, in the State of Missouri to Chillicothe, in said State; from Salisbury, in the County of Chariton, State of Missouri, to Glasgow, in Howard County; from Moberly in a northerly direction through the Counties of Randolph, Macon, Adair, and Schuyler, in the State of Missouri, and from thence into

or through the Counties of Appanoose, Davis, and Wapello, in the State of Iowa, to Ottumwa, in said State, and from Centralia, in the County of Boone, State of Missouri, to Columbia, in said County and State.

(2) From Montpelier in the County of Williams, State of Ohio, in a southeasterly direction, into or through the Counties of Williams, Fulton, and Lucas, in said State of Ohio, to a point of connection with the railroad of the railway Company at or near Maumee, in said County of Lucas; from New Haven, in the County of Allen, State of Indiana, into or through said County and the County of Dekalb, in said State, to a point of connection with the railroad of the Railway Company at or near Butler, in said County of Dekalb; from a point of connection with the railroad of the Railway Company, in the town of Montpelier, in the County of Williams, State of Ohio, and extending in a westerly direction through said County and into or through the Counties of Steuben, LaGrange, Noble, Elkhart, St. Joseph, LaPorte, Porter, and Lake, in the State of Indiana, to a point of connection with the tracks of the Chicago Terminal Transfer Railway Company, at or near Clarke Junction, in the State of Indiana.

[fol. 6] (3) From the grounds of the Union Pacific Transfer, in the City of Council Bluffs, Iowa, and from the freight depot of the Railway Company, in the City of Council Bluffs, to a connection with the line from the Union Pacific Transfer through the Counties of Pottawattamie, Mills, Fremont, and Page, in the said State of Iowa, and the Counties of Atchison, Nodaway, Gentry, and Daviess, in the State of Missouri, to or near Pattonsburg, in said County of Daviess and State of Missouri, and from Pattonsburg to said Chillicothe.

(4) From a point of connection in or near the City of Des Moines with the tracks of the Des Moines Union Railway Company and extending from thence in a southeasterly direction through the Counties of Polk, Marion, and Monroe to the town of Albia, in said County of Monroe; from Albia, in said County of Monroe, thence in a southerly direction through the Counties of Monroe and Appanoose to a point in or near the town of Moulton, in said County of Appanoose;

All of which said lines of railroad aggregate in length about 2,237.40 miles, and are located in the above-mentioned States as follows:

| | |
|---|---|
| In the State of Missouri | 652.35 miles |
| In the State of Iowa | 208.96 miles |
| In the State of Indiana | 357.46 miles |
| In the State of Illinois | 742.81 miles |
| In the State of Michigan | 105.60 miles |
| In the State of Ohio | 170.22 miles |

and also owned and now owns certain rolling stock and equipment and other property, both real and personal, rights, privileges and franchises appertaining to or used in connection with its lines of railroad and business, and was and is also the owner of certain bonds and stocks of various other corporations.

Fourth: Complainant further alleges, on information and belief, that the lines of railroad owned and operated by said defendant Railway Company are subject to certain mortgages and other liens and that certain of the equipment owned by the defendant Railway company is subject to various liens, which said mortgages and other liens secure indebtedness of the defendant Railway Company outstanding on November 1, 1931, as Complainant [fol. 7] is informed and believes, as follows:

| | |
|---|---|
| First Mortgage Bonds | $ 33,891,000 |
| Second Mortgage Bonds | 13,993,000 |
| Detroit & Chicago Extension Bonds | 2,072,000 |
| Des Moines Division Bonds | 1,600,000 |
| Toledo & Chicago Division Bonds | 3,000,000 |
| Omaha Division Bonds | 3,173,500 |
| Columbia & St. Louis R. R. Co. | 200,000 |
| First Lien Terminal Gold Bonds | 4,063,000 |
| Refunding & General Mortgage Bonds, Series A | 12,500,000 |
| Refunding & General Mortgage Bonds, Series B | 15,500,000 |

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| Refunding & General Mortgage Bonds, Series C | 17,867,000 |
| Refunding & General Mortgage Bonds, Series D | 15,000,000 |
| Debenture B Bonds | 1,248,000 |
| Equipment Trust Certificates of 1920 | 3,021,600 |
| Equipment Trust Certificates of 1922 | 1,698,000 |
| Equipment Trust Certificates of 1923, Series C | 938,000 |
| Equipment Trust Certificates of 1924, Series D | 1,328,000 |
| Equipment Trust Certificates of 1924, Series E | 1,539,000 |
| Equipment Trust Certificates of 1925, Series F | 2,790,000 |
| Equipment Trust Certificates of 1927, Series G | 1,925,000 |
| Equipment Trust Certificates of 1929, Series H | 2,925,000 |
| Bank Loans | 9,750,000 |
| North Kansas City Development Co. land purchase contr. | 925,200 |
| Total | $150,947,300 |

Fifth: Complainant is informed and believes that failure to meet the interest on the foregoing indebtedness, or any part thereof, as such interest matures will operate as a default under the mortgages or other instruments securing such indebtedness and render such mortgages or other instruments enforcible, and will permit the trustees of the respective mortgages or other instruments securing said indebtedness to bring suitable actions and proceed-[fol. 8] ings to enforce the liens created by said mortgages or other instruments securing said indebtedness, by the institution of actions for the foreclosure of said liens or the enforcement of the other proper remedies granted by said mortgages or other instruments in case of default in the performance by the defendant Railway Company of its covenants contained therein.

Complainant is informed and believes that the annual interest charge payable in respect of the foregoing indebtedness amounted, in the year ending October 31, 1931, to more than $6,806,389, and that the surplus or net revenues derived by the defendant Railway Company, from the

operation of its properties and from other sources during said period were insufficient, as shown in the reports of said defendant Railway Company, to pay and discharge such interest requirements, and further, that the excess of liabilities of the defendant Railway Company over and above the amount of the book values of its assets exceeded the sum of $6,000,000. Complainant further alleges, on information and belief, that the gross earnings of the defendant Railway Company for the ten months ending October 31, 1931, of the present fiscal year, were less by a sum in excess of $11,290,000 than the gross earnings of said defendant Railroad Company for the same period of the preceding fiscal year, while there has been no substantial diminution or decrease in the fixed charges of the defendant Railway Company.

Complainant further alleges, upon information and belief, that included in the assets of the defendant Railway Company, as stated in its published balance sheets, are various securities owned by the defendant Railway Company and in its said balance sheets included at their par value or purchase price, which said securities, by reason of the financial and legal situation of the companies issuing the same, are either wholly valueless or of an actual value considerably less than the par value or purchase price thereof as so stated in the balance sheets of the defendant Railway Company; and Complainant further alleges, upon information and belief, that if the true or actual value of the assets of the defendant Railway Company were stated upon its balance sheets, the result would be that the undisputed liabilities of the defendant Railway Company would exceed the actual value of its assets by many millions of dollars.

[fol. 9] Sixth: Complainant alleges that the defendant Railway Company is indebted to Complainant in the sum of $49,651.95 for cross, switch ties and preservative treatment furnished by Complainant to the defendant Railway Company at the request of said defendant, and for which said defendant agreed to pay to Complainant the sum of $49,651.95; that payment of said sum has been duly demanded by Complainant from said defendant, and payment thereof refused, and the same is now wholly due and unpaid, although said indebtedness is admitted by said de-

fendant to be due and payable by it to Complainant; that said defendant has neglected to pay to Complainant the said indebtedness, or any part thereof, and claims to be unable so to do by reason of its financial condition. That said cross-ties, switch ties [switch ties], and preservative treatment were furnished to said defendant for the purpose of the operation of its lines of railroad and to fulfill the duties of said defendant Railway Company towards the public, as prescribed by Acts of Congress of the United States and statutes of the various States in which its lines of railroad are located, and in order to enable said defendant Railway Company to discharge its obligations under the various franchises and privileges granted to it in connection with the operation of its lines of railroad.

Seventh: Complainant further alleges, upon information and belief, that in order that the defendant Railway Company may be enabled to comply with the requirements of Acts of Congress of the United States and the laws of the various States in which its lines of railroad are situated, as well as with the lawful rules and orders of the Interstate Commerce Commission and the Public Service or Public Utility Commissions of said respective States, with reference to the manner of operation of the lines of railroad of the defendant Railway Company and the conduct of its business as a common carrier, it will be necessary for said defendant Railway Company to expend large sums of money, and that the revenues and resources of said defendant Railway Company, after the payment and discharge of its fixed charges, will be insufficient to admit of such expenditures, and further, that upon failure to observe and comply with certain of said rules and requirements the defendant Railway Company will be and become subject to the payment of large fines and penalties, enforceable agains its property in preference and priority to the claims and demands of its general and unsecured creditors.

[fol. 10] Eighth: Complainant is informed and believes that the defendant Railway Company has outstanding floating indebtedness, for materials and supplies furnished to it, in an amount upwards of $4,730,476.00; that said floating indebtedness is now overdue; that the defendant Railway Company is unable to pay the same, and that the

holders thereof are pressing for payment of the same; that the defendant Railway Company is without means to effect loans for the purpose of meeting such obligations, and is without collateral available for such purpose. Complainant is informed and believes that the defendant Railway Company has no means at hand with which to meet its immediate and pressing needs in operating its lines of railroad; that many of the creditors to whom the defendant Railway Company is liable are pressing it for immediate payment and that some of said creditors will bring suits in respect of their said claims, and may levy execution on the lines of railroad owned by the defendant Railway Company and on the materials and supplies and other property of the defendant Railway Company on hand and kept by the defendant for necessary use in operating its lines of railroad; and Complainant alleges, on information and belief, that there is grave danger that the lines of the defendant Railway Company may no longer be operated in a single system, but may be broken up and separately operated, and that it is essentially to the interests of the defendant and to the interests of the public and to Complainant that the property of the defendant Railway Company should not be sacrificed. That the only means whereby the defendant Railway Company can pay its floating indebtedness and discharge its current obligations is by the continued maintenance and operation of said system of railroads as a whole and by an uninterrupted use thereof; that any suits upon or progress against its properties or its revenues would seriously embarrass and cripple it and greatly diminish, if not destroy, its power successfully to operate said system together with all its appurtenances; that, notwithstanding the fact that every effort has been made to provide funds for the payment of the indebtedness of the defendant, or for the extension of the time of payment thereof, such efforts have proved unsuccessful, and that unless some definite action is taken on behalf of all of the creditors, so that the operation of the defendant's system may be kept intact, great and severe loss will be inflicted on all creditors.

[fol. 11] Ninth: Complainant believes that unless the Court, in view of the facts above stated, shall take the railroads and properties of the defendant Railway Company

into judicial custody for the protection of every interest therein, immediately upon default individual creditors will assert their rights and remedies in different courts. That the result will be a multiplicity of suits and a race of diligence; that attempts will be made to secure judgments and priorities; that levies will be made upon cars, rolling-stock material and supplies indispensable to the operation of said lines of railroad, which will greatly interfere with and ultimately prevent the defendant from the proper performance of its duties as a common carrier, and will seriously diminish its earnings; and that it will be impossible to operate said lines of railroad as a whole, to the serious inconvenience of the public.

And your Complainant alleges that an attempt by it to enforce at law its claims as a general creditor would precipitate similar action on the part of numerous other creditors, and this in turn would [be] lead to wasteful strife and controversy, which Complainant believes can be avoided, and the property preserved for equitable distribution among those entitled thereto, only by the intervention of a court of equity and the granting of equitable relief, including the appointment of a receiver.

Tenth: Complainant is further informed and believes that, in the performance of the public duties of the defendant Railway Company, it is necessary that prompt payment be made by it of traffic balances, terminal charges and trackage rentals, involving business with other railroad and terminal companies, as the same become due, and that a failure to pay the same will result in the forfeiture of valuable rights and franchises of the defendant Railway Company under leases, trackage contracts, and municipal ordinances, and the breaking off of the exchange of business by connecting carriers, resulting in largely decreased revenues; and Complainant is informed and believes, and therefore alleges, that the defendant Railway Company has become and is wholly and completely insolvent.

Eleventh: That under the foregoing circumstances Complainant alleges that the intervention of a court of equity, for the protection of Complainant's rights and the rights of all other parties in interest, is immediately required, and

[fol. 12] especially for the timely appointment of a receiver to take charge of and preserve the property of the defendant Railway Company, continue the operation of its lines of railroad for the accommodation of the public, and collect and receive, and properly appropriate, the income of said property under the orders of the court to be made from time to time until the final decree of the court in the premises.

Twelfth: That this is a civil suit in the nature of a claim in equity, and the matter in dispute exceeds, exclusive of interest and costs, the sum of $5,000.

Inasmuch, therefore, as Complainant has no adequate remedy at law for its aforesaid grievances, and can have relief only in equity, Complainant files this bill of complaint in behalf of itself and of other creditors of the defendant Railway Company, who may come in and contribute to the expense hereof, and prays for equitable relief as follows:

(1) That the rights of Complainant and of the other creditors of the [defentant] Railway Company, including all holders of its mortgages, bonds and secured obligations, may be ascertained and decreed, and that the Court will fully administer the funds in which Complainant is interested, constituting the entire property and assets of the defendant Railway Company; and will, for such purpose, marshal all the assets of the defendant Railway Company and ascertain the several and respective liens and priorities existing upon each and every part of said property and assets, and enforce and decree the rights, liens and equities of the creditors of the defendant Railway Company, as the same may be finally ascertained and decreed by the Court, in and to each and every portion of the property and assets of the defendant Railway Company.

(2) That for the purpose of preserving the unity and integrity of the railroads and property of the defendant Railway Company and of preventing the disruption thereof by separate executions, attachments or sequestrations, or by the enforcement of liens upon separate portions thereof, and for the purpose of continuing the business of the defendant Railway Company as a going concern and han-

dling properly the earnings derived from the operation of said railroads and property and preventing commerce between the States being interfered with and a multiplicity of suits, a receiver be appointed by this Honorable Court of all and singular the railroads, rolling-stock, franchises, rights, property and premises of every kind and description and wheresoever located belonging to the defend- [fol. 13] ant Railway Company, together with the rents, issues, profits, revenues and income thereof, with full power and authority to demand, use, convey, collect and take into possession the goods, chattels, rights, credits, moneys, effects, lands, tenements, books, papers, and property of every kind and description belonging to the defendant Railway Company, and with the usual powers of receivers in such cases, and to operate said railroads and property and collect and receive the income and tolls thereof and apply the same under the order or decree of this Honorable Court, and to appoint such agents as may be necessary to the proper management of all of said property and premises; and that the defendant, Wabash Railway Company, be decreed to make such transfers or conveyances, to the receiver appointed as herein prayed, as may be necessary or proper.

(3) That a writ of injunction may be issued out of and under the seal of this Honorable Court, directing, commanding, enjoining, and restraining the defendant, Wabash Railway Company, and all persons, firms, and corporations whatsoever and wheresoever located, situated or domiciled, from interfering with, transferring, selling or disposing of, attaching, levying upon, or in any manner whatsoever disturbing any part of the railroads and property now or hereafter in the possession of any receiver appointed in this cause.

(4) That the defendant be required to answer all and singular the matters above stated.

(5) That a writ of subpoena may be granted to Complainant, to be directed to the defendant, thereby requiring the defendant personally to appear on a certain day before the Court, and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath (answer under oath being hereby expressly

waived) and, further, to perform and abide by such further order, direction or decree as to the Court shall seem meet.

(6) That Complainant may have such other and further relief in the premises as the nature and circumstances of this case may require and as to this Honorable Court shall seem meet.

FRED L. WILLIAMS,
EARL F. NELSON,
Solicitors for Complainant.

[fol. 14] State of Missouri,
City of St. Louis.—ss.:

E. E. Pershall, being duly sworn, deposes and says, that he is President of the T. J. Moss Tie Company, Complainant in the above entitled cause; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

E. E. PERSHALL.

Subscribed and sworn to before me this 1st day of December, 1931.

(Seal) ODILE DI FULVIO,
Notary Public.

My commission expires on the 23rd day of September, 1934.

Filed Dec. 1, 1931. Jas. J. O'Connor, Clerk.

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[fol. 15] Answer.

(Filed Dec. 1, 1931.)

Wabash Railway Company, the defendant in this cause, for answer to the bill of complaint herein or so much or such parts thereof as the defendant is advised it is necessary or material for the defendant to make answer unto, answering, says:

First: The defendant admits all the allegations of said bill of complaint.

Second: The defendant, reiterating the admission of the preceding paragraph of this answer, and believing it to be its duty to its stockholders and creditors to protect its property and business and to treat the same as a trust fund for their security, joins in the prayer of said bill of complaint and prays that this Court, sitting in equity, will take possession of the railroads and property of the defendant, through the appointment of a receiver, as prayed in said bill of complaint, and thereby preserve the unity of its system of railroads and protect and preserve the corporate franchises, privileges and property, and preserve the corporate existence of the defendant, and protect and preserve its railroads and property (real and personal) [fol. 16] from being sacrificed under any proceedings, which can or may be taken, liable to prejudice or sacrifice the same; and it accordingly prays that inasmuch as there is no adequate remedy at law in the premises, for the complainant or for the defendant, that this Court will, for the purposes aforesaid, appoint a receiver as prayed for in said bill of complaint, and authorize, empower, and direct the receiver so appointed to take possession of the entire property and business of this defendant and to preserve, manage, operate, and control the same, pay all indebtedness due or to become due by this defendant and otherwise discharge all the duties ordinarily imposed by courts upon receivers in similar cases; that on the final hearing of this cause this Court will, on the said bill of complaint and this answer or such supplemental bills, cross-bills, or petitions as may properly be filed herein, make such decree or decrees with respect to the property of the defendant as shall deal with the same on general equitable principles; that this Court will cause all the liens upon said property or any part thereof, and all rights and claims in equity of persons interested therein, to be ascertained, defined and determined, and that the proceeds arising from the sale of said property or any part thereof be applied, under the said orders or decrees of this Court, according to the rights, interests, and equities of the parties interested therein; and that this Court will direct all persons in possession of the property of this defendant, or any part

thereof, to surrender the same to the said receiver or to hold such property under such receiver.

N. S. BROWN,
Solicitor for the Defendant,
Wabash Railway Company.

State of Missouri,
City of St. Louis—ss.

N. S. Brown, being duly sworn, deposes and says that he is Vice President and General Solicitor of Wabash Rail-
[fol. 17] way Company, the defendant in the above entitled cause; that he prepared the foregoing answer and that the statements and requests therein set forth are made by him pursuant to authority of the Board of Directors of said defendant.

N. S. BROWN.

Subscribed and sworn to before me this 1st day of December, 1931.

ODILE DI FULVIO,
(Seal) Notary Public.

My Commission expires Sept. 23, 1934.

Filed Dec. 1, 1931. Jas. J. O'Connor, Clerk.

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[fol. 18] (Order Appointing Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers, etc.)

(Filed December 1, 1931.)

District Court of the United States for the Eastern Division of the Eastern Judicial [—] of Missouri.

T. J. Moss Tie Company, Complainant,
No. 9704. vs. In Equity,
Wabash Railway Company, Defendant.

On reading and considering the verified bill of complaint in this cause, and on motion of counsel for the complainant and the defendant Wabash Railway Company, appearing by its Counsel and assenting thereto, and due deliberation being had, it is

Ordered, Adjudged and Decreed by the Court:

1. That Walter S. Franklin, a resident of the City of St. Louis, State of Missouri, and Frank C. Nicodemus, Jr.,

of New York, New York, be, and they are hereby appointed Receivers of all and singular the railroads, lands, property, assets, rights and franchises of Wabash Railway Company, including all railroads and other property and assets, real, personal and mixed, of whatever kind or description and wherever situated, owned, leased or operated by said Railway Company, with all tracks, terminal facilities, warehouses, offices, stations, shops and all other buildings and appurtenances of every kind, and all locomotives, cars and other rolling stock and equipment of every kind and description, and all tools, machinery, furniture, fixtures, coal, materials and supplies, and all books of account, records and other books, papers, cash in banks, and all other moneys, all debts, things in action, credits, stocks, [fol. 19] bonds, securities, deeds, leases, contracts, muniments of title, bills receivable, accounts receivable, rents, issues, profits and income accruing and to accrue, as well as all lease-hold interests and operating and other contracts, and all rights, interests, easements, privileges and franchises of said Railway Company, and all other assets of every kind and description.

2. That said Receivers be, and they are hereby authorized, empowered and directed immediately to take possession of all and singular said railroads, rolling stock, franchises, rights, property and premises, and to run, manage, maintain and operate the said railroads and properties wherever situated, or found, whether in this State, Judicial District or elsewhere, including such railroads and property as the said Railway Company holds, controls or operates under lease, equipment trust agreements or otherwise, and to use, manage and conduct such business in such manner, in their judgment, as will produce the best results, and, to this end, exercise the authority and franchises of said Railway Company and discharge all the public duties obligatory upon it, and to preserve said railroads and property in proper condition and repair and manage and operate said railroads and property according to the requirements of the valid laws of the various States in which the same are situated, and in the same manner that the defendant Railway Company

would be bound to do if in possession thereof, and to employ and discharge and fix the compensation of ll officers, managers, superintendents, agents and employes, and to make such payments and disbursements as may be needful and proper in so doing, and to collect and receive the income and tolls of said property, including the dividends on stock and interest upon bonds or other securities, and to hold and retain the net revenues thereof, in such manner and to the end that the same may be applied, under this order and such orders as this Court may hereafter make.

3. That said Receivers be, and they are hereby authorized and empowered to institute and prosecute within this State or elsewhere, and in their names as Receivers, or in the name of the Wabash Railway Company, as they may [fol. 20] be advised by Counsel, all such suits as may be necessary in their judgment for the proper protection of said property and the discharge of their trust, and, likewise, to defend, compromise or settle all such actions instituted against them as Receivers, and also to appear in and conduct the prosecution or defense of, or compromise or settle, any actions, proceedings or suits now pending or which may hereafter be brought in any court or before any officer, department, commission or tribunal, to which the defendant Railway Company is or shall be a party, and which in the judgment of said Receivers affect or may affect the property of which they are hereby appointed Receivers, but no payments shall be made by said Receivers in respect of any such suits, actions or proceedings without the further order or direction of the Court; and no action taken by the Receivers in the defense or settlement of any such actions or suits against the defendant Railway Company shall have the effect of establishing any claim upon or right in the property or funds in the possession of the Receivers so as to alter or change the existing equities or legal rights of the parties.

4. That within ten days from this date the said Receivers execute a bond in the sum of One Hundred Thousand Dollars ($100,000.00) and file the same [—] the office of the Clerk of this Court, with one or more sureties approved by this Court or one of the judges hereof, for the benefit of whom it may concern, conditioned to the effect that they will well and truly perform the duties of their office, and duly

account for all moneys and property which may come into their hands, and abide by and perform all things which they shall be directed by the Court to do.

5. That said Receivers are hereby authorized, in their discretion, from time to time, out of the funds coming into their hands, to pay all taxes due upon the mortgaged property and to pay the expenses of operating said properties and executing the trust, and to pay the wages of employes, and to pay and discharge all such traffic and car mileage balances and amounts for car and equipment repairs as may be due or become due to connecting or other railroads or other common carriers, and also all interest which may become due and payable upon bonds, equipment trust agree-[fol. 21] ments, land purchase contracts or bank loans of the defendant Railway Company secured by mortgage or lien upon all or any part of its railroads or terminal property, and any unpaid pay rolls, vouchers and supply accounts, and any salaries, wages and amounts due and payable for services rendered to the defendant Railway Company in the usual and customary operation of its properties; also all unpaid outstanding pay checks and wage checks representing labor actually performed or services rendered for the defendant Railway Company, and all amounts now or hereafter payable by sureties upon all supersedeas or appeal bonds executed by said sureties without security, for the benefit of the defendant Railway Company.

6. That said receivers shall open books of account and cause to be kept therein due and proper account of the earnings, expenses, receipts and disbursements of the railroads and property of which they are hereby appointed Receivers, and shall preserve proper vouchers for all payments made by them on account thereof, and shall deposit the moneys coming into their hands in some bank or banks, and report to the Court the bank or banks so selected.

7. That all persons, firms or corporations having in their possession any of said property and premises of which the Receivers are hereby appointed, shall deliver said property and premises to said Receivers; and each and every of the officers, directors, agents and employes of said defendant Railway Company be and they are hereby

required and commanded to forthwith turn over and deliver to said Receivers, or their duly constituted representatives, any and all books of account, vouchers and papers, deeds, leases and contracts, bills, notes, accounts, moneys, or other property, in his or their hands or under his or their control, belonging to or in the possession of said defendant Railway Company or to which it is or may become entitled, and each of said officers, directors, agents and employes is hereby commanded and directed to abide by and conform to such orders as may be given from time to time by said Receivers, or their duly constituted representatives, in conducting the operation of the said property and in the discharge of their duties as Receivers.

[fol. 22] 8. The Wabash Railway Company and the officers, directors, agents, attorneys and employes of said Railway Company, and all other persons claiming to act by virtue of or under said Railway Company, and all other persons, firms and corporations whatsoever and wheresoever situated, located or domiciled, be and they are hereby restrained and enjoined from interfering with, attaching, levying upon or in any manner whatsoever disturbing any portion of the property and premises of which Receivers are hereby appointed, or from taking possession of, or in any way interfering with, the same or any part thereof, or from interfering in any manner to prevent the discharge by said Receivers of their duties or the operation of said property and premises under the orders of this Court.

9. That said Receivers shall retain possession of and continue to discharge the duties or trusts aforesaid until the further order of this Court, and shall from time to time make report of their conduct in the premises, and may from time to time apply to this Court for such other and further order and direction as they may deem necessary and requisite to the due administration of said trust. That said Receivers, within ninety days from the entry of this order, file with this Court an inventory of property coming into their possession as such Receivers, and also file a separate report or reports showing the amount of moneys coming into their hands as such Receivers, derived from the operation of the railroads and property of the defendant Railway Company prior to the entry of this order.

10. That the complainant herein is authorized to apply to any other court of competent jurisdiction for such order or orders in the premises as the complainant may deem necessary in aid of the orders issued by this Court. The right is reserved to the parties hereto to apply to the Court for any further or other instructions to the said Receivers; and this Court Reserves the right to make such further orders as may be proper, and in all respects regulate and control the conduct of said Receivers.

11. In case of the death, resignation or removal of either of the Receivers hereby appointed, and the appointment of a successor or successors to the Receiver who shall so die, resign or be removed, all of the provisions of this order shall apply to such successor or successors without further order or direction of the Court.

[fol. 23] 12. The Court hereby reserves the full right and jurisdiction to make from time to time such further orders, amplifying, extending, limiting or otherwise modifying or changing this order as to it may at any time seem best.

CHARLES B. DAVIS,
District Judge.

Dated 12-1-1931.

Filed Dec. 1, 1931. Jas. J. O'Connor, Clerk.

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[fol. 24] (Order Appointing Nat S. Brown as General Counsel for Receivers.)

Upon consideration, it is

Ordered, That Nat S. Brown, Esq., of St. Louis, Missouri, be and he is hereby appointed General Counsel of the Receivers this day appointed in this cause by this Court, with the powers and duties ordinarily enjoyed by and imposed upon general counsel of railroad companies, and said Receivers are hereby directed to consult with him from time to time regarding the legal effect of their proposed acts, and, through him to present to the Courts their petitions, answers, reports and communications; that said General Counsel be and he is hereby authorized, until further order of this Court, to employ such attorneys, assistants, and other persons as he may deem necessary in

order that the administration of the trust estate may be lawfully conducted under the order appointing the Receivers herein, and such further orders as may be made by the Court, and to fix the amount of compensation payable to the attorneys, assistants and other persons so employed, which shall be paid out of the funds coming into the hands of the Receivers herein as a part of the expense of administering the trust estate.

CHARLES B. DAVIS,
District Judge.

Dated 12-1-1931.

Filed Dec. 3, 1931. Jas. J. O'Connor, Clerk.

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[fol. 25] Record Entry to Approving and Filing Receivers' Bond.

Before Judge Davis—Court No. 2.

Dec. 3, 1931.

Now come Receivers and present their bond in the sum of $100,000.00, which bond is approved and filed.

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[fol. 26] (Order Appointing Forrest C. Donnell as Special Master, etc.)

District Court of the United States for the Eastern Division of the Eastern District of Missouri.

T. J. Moss Tie Company, Complainant,
No. 9704. vs. In Equity.
Wabash Railway Company, Defendant.

Upon consideration, it is hereby

Ordered:

That Forrest C. Donnell be and he is hereby appointed Special Master in this cause and invested with the customary powers of a special master under the Federal Equity Rules.

All matters arising in the progress of this cause, which by the rules and practices of this court, or by the general or special orders of the Court, are required or proper to be referred to a special master, are hereby referred to him.

All claims, interpleas, intervening petitions or other petitions hereafter filed in this cause, by which the claimant, interpleader, intervener, or other pleader seeks to recover any money or property from the Receivers appointed in this cause out of the estate in their hands, are hereby referred to him for his investigations, determination and report. Upon the filing of any such claim, intervening petition, interplea or other such pleading the clerk of this court shall, as of course, and without any further order, transmit the same to the special master, who shall thereupon proceed with all reasonable dispatch to hear and determine the matters presented by it and to report his finding thereon to this court.

[fol. 27] In hearings before the special master he shall proceed in all respects according to the usage and practice in chancery in such cases.

Before settling his report in any contested case, the special master shall give to the parties in interest reasonable notice of the time when and the place where he will finally settle such report and of the fact that they may appear before him and file such exceptions to the same as they may desire. Any party to such a case, who feels aggrieved at the finding or decision of the special master may, at the time fixed by the special master for settling his report, file any such exceptions in writing to the same as may be deemed appropriate by such party, and no exception not so filed will be considered by the Court. The master will notify all parties interested in the matters presented by petitions in such cases of this fact.

CHARLES B. DAVIS,
District Judge.

Dated March 19, 1932.

Filed Mar. 19, 1932. Jas. J. O'Connor, Clerk.

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[fol. 28] (Order as to Filing of Claims of Creditors of Wabash Railway Company, etc.)

In the District Court of the United States For the Eastern Division of the Eastern District of Missouri.

T. J. Moss Tie Company, Complainant,
No. 9704, vs. In Equity.
Wabash Railway Company, Defendant.

On this day the petition of T. J. Moss Tie Company, Complainant, filed herein, came on to be heard, and it appearing

to the Court that it is right and proper that the creditors of the defendant, Wabash Railway Company be determined, and the amount of their respective claims and the order in which the same are entitled to payment, be ascertained, and the solicitor for defendant appearing and consenting to the entry of the order sought by said petition, it is, on motion of the solicitors for complainant, hereby

Ordered:

1. That the matter of the accounts, debts and claims of all persons claiming to be creditors of the defendant, Wabash Railway Company (other than the holders of bonds or other obligations secured by mortgage or lien, or the trustees thereof, or such claims as may be paid under existing orders entered herein), against the property in the hands of the Receivers appointed in this cause, be and the same is hereby referred to Forrest C. Donnell, heretofore appointed Special Master in this cause, to ascertain and report to the Court a list of all creditors, secured and unsecured, except as aforesaid, of the defendant, Wabash Railway Company, together with a statement showing the nature and amount of their respective accounts, debts and claims.

2. That said Special Master be and he is hereby authorized, empowered and directed to investigate, hear proof, and report on all claims filed by said persons claiming to be creditors, both as to the correctness and validity of all such accounts, debts and claims, and also as to the lien and priority, if any, thereof.

3. That all persons having any such accounts, debts or claims shall file their claims on account thereof with the [fol. 29] said Special Master at his office, Room 700 Central National Bank Building, 7th and Olive Streets, St. Louis, Missouri, on or before July 1, 1932.

4. That said Special Master is hereby directed to give public notice, by publication once a week for four successive weeks in some newspaper of general circulation published in each of the Cities of St. Louis and Kansas City, Missouri; Omaha, Nebraska; Des Moines, Iowa; Chicago, Springfield and Danville, Illinois; Fort Wayne, Indiana; Toledo, Ohio; Detroit, Michigan, and Buffalo and

New York, New York, of the time within which claims on account of such accounts, debts and claim shall be filed, and said Special Master shall as to all such claims filed with him give proper and timely notice of the time and place the City of St. Louis when said claimants will be given an opportunity to present and make proof, before said Special Master, of the amounts of their respective claims and the lien and priority, if any, thereof, and to present their objections, if any, to the allowance of claims of said other creditors presented to said Special Master, which said hearings the said Special Master may adjourn from time to time and from place to place, as in his discretion he may deem proper and necessary, and further that all the solicitors of record in this cause be given timely notice of the time and place of each of said hearings, and, for the taking of said account and the discovery of the matters aforesaid, all creditors, both secured and unsecured, except as aforesaid, of the defendant, Wabash Railway Company, are ordered to produce proof of their respective claims as herein provided, and submit to such examination in respect thereof as the said Special Master may direct.

5. That said Special Master is hereby directed to proceed under this order in accordance with the authority and direction contained in the order appointing said Special Master, entered in this cause on March 19, 1932.

Dated April 7, 1932.

CHARLES B. DAVIS,
District Judge.

Filed Apr. 7, 1932. Jas. J. O'Connor, Clerk.

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[fol. 30] Inventory of Physical Properties and Assets Taken Into the Possession of the Receivers on December 1, 1931.

(Filed Feb. 26, 1932.)

Pursuant to the requirements of the order of the Court entered in this cause on December 1, 1931, upon the undersigned receivers of the railroads and properties of the defendant Wabash Railway Company, the said Receivers hereby submit the following inventory of the lines of rail-

road, rolling stock, materials and supplies, and other physical properties constituting a part of the trust estate being administered by said Receivers under the orders and directions of this Court, to-wit:

I.

The following described lines of railroad owned by the defendant Wabash Railway Company, and located in the States of Indiana, Ohio, Illinois, Missouri, Michigan and Iowa, to-wit:

1. The railroad extending from the City of Toledo, in a westerly direction into or through the counties of Lucas, Fulton, Henry, Defiance and Paulding, in the State of Ohio, and the Counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren, in the State of Indiana, and the counties of Vermilion, Champaign, Piatt, Macon, Sangamon, Morgan and Scott, in the State of Illinois, to Bluffs, in said State, and from Bluffs, through Naples in said County of Scott, to East Hannibal on the east bank of the Mississippi River in the county of Pike, State of Illinois, including all property of the Railway Company situate in the city of Hannibal, County of Marion and State of Missouri; from Bluffs into or through the Counties of Scott, Morgan, Pike, Brown and Adams, in the State of Illinois, to Camp Point in said County of Adams, including all property of the Railway Company situate in the City of Quincy in said County of Adams; from Clayton into or through the counties of Adams and Hancock, in the State of Illinois, to Elvaston, Illinois, together with all other property of the Railway Company situate in Hancock County, Illinois, including an undivided one-half interest in the railroad extending from the town of Hamilton in said County to the east approach of the bridge over the Mississippi river opposite Keokuk, Iowa; [fol. 31] from Decatur into or through the Counties of Macon, Christian, Montgomery, Macoupin, Madison and St. Clair in the State of Illinois, to East St. Louis in said State; from Effingham into or through the Counties of Effingham, Shelby, Moultrie, Piatt, McLean, Champaign and Ford, to Forrest in Livingston County, in the State of Illinois, and through the Counties of Livingston and LaSalle from Fairbury to Streator in said State, from Alta-

mont, in the County of Effingham, State of Illinois, to Shumway in said County; from Forrest through the Counties of Livingston, Kankakee, Will and Cook in the State of Illinois to or near the City of Chicago in said State; from Edwardsville, Madison County, Illinois, to Edwardsville Crossing in said County; from Detroit, in the State of Michigan, in a southwesterly direction, into or through the Counties of Wayne, Washtenaw, Monroe and Lenawee, in the State of Michigan, and from thence into or through the Counties of Fulton and Williams, in the State of Ohio, and into or through the County of DeKalb to Butler in the State of Indiana; from the City of St. Louis, State of Missouri, by the way of North Market Street and Bellefontaine to Ferguson in the County of St. Louis; from the Union Depot in the said City of St. Louis by way of Forest Park to Ferguson and from thence in a northwesterly direction into and through the Counties of St. Louis, St. Charles, Warren, Montgomery, Audrain, Boone and Randolph in the State of Missouri to Moberly, in said State (including the bridge over the Missouri River at St. Charles), and from thence in a westerly direction into or through the Counties of Randolph, Chariton, Carroll, Ray, Clay and Jackson in the State of Missouri to Kansas City in said State; from Brunswick in a northwesterly direction through the Counties of Chariton, Linn and Livingston, in the State of Missouri, to Chillicothe, in said State; from Chillicothe, in said County of Livingston, to Elm Flats, near the town of Pattonsburg, in the County of Daviess, State of Missouri; from Salisbury in the County of Chariton, State of Missouri, to Glasgow in Howard County; from Moberly in a northerly direction through the Counties of Randolph, Macon, Adair and Schuyler in the State of Missouri, and from thence into or through the Counties of Appanoose, Davis and Wapellow in the State of Iowa to Ottumwa in said State and from Centralia, in the County of Boone, State of Missouri, to Columbia in said County and State.

2. The railroad extending from Montpelier in the County of Williams, State of Ohio, in an easterly direction, into or through the Counties of Williams, Fulton and Lucas in said State of Ohio to a point of connection with the railroad of the Railway Company at or near Maumee in said

County of Lucas; from New Haven in the County of Allen, State of Indiana, into or through said County and the County of DeKalb in said State to a point of connection with the railroad of the Railway Company at or near Butler in said County of DeKalb; from a point of connection with the railroad of the Railway Company in the town of Montpelier in the County of Williams, State of Ohio, and extending in a westerly direction through said County and into or through the Counties of Steuben, La Grange, Noble, Elkhart, St. Joseph, La Porte, Porter and Lake in the State of Indiana, to a point of connection with the tracks of The Baltimore and Ohio Chicago Terminal Railroad Company at or near Clarke Junction, in the State of Indiana.

3. The railroad extending from the grounds of the Union Pacific Transfer in the City of Council Cluffs, Iowa, and from the freight depot of the Railway Company, in the City of Council Bluffs, to a connection with the line from the Union Pacific Transfer, through the Counties of Pottawattamie, Mills, Fremont and Page in said State of Iowa, and the Counties of Atchison, Nodaway, Gentry and Daviess in the State of Missouri to Elm Flats near Pattonsburg, in said County of Daviess and State of Missouri.

[fol. 32] 4. The railroad extending from a point of connection in or near the City of Des Moines with the tracks of the Des Moines Union Railway Company and extending from thence in a southeasterly direction through the Counties of Polk, Marion and Monroe to the Town of Albia in said County of Monroe; from Albia in said County of Monroe thence in a southerly direction through the Counties of Monroe and Appanoose to a point in or near the town of Moulton in said County of Appanoose.

5. The railroad formerly belonging to the Champaign and Southeastern Railroad Company, extending from Champaign to Sidney, in the County of Champaign, State of Illinois.

6. The railroad formerly belonging to The Attica, Covington and Southern Railway Company, extending from Attica to Covington in the County of Fountain, State of Indiana;

together with all rights of way lands and other lands, all stations and depots, terminal facilities, yards, roadbeds, rails, tracks, sidetracks, switches, turn-tables, fences, bridges, viaducts, culverts, embankments, platforms, sheds, machine and other shops, machinery, elevators, warehouses, car houses, engine houses, freight houses, coal houses, wood houses, power houses, buildings, structures, tools, implements, telegraph, telephone and electric power transmission lines, water stations, water reservoirs, and water pipe lines, and other water facilities, wharves, docks, piers, landings, ferries and appurtenances, engines, cars and other rolling stock and equipment hereinafter more particularly described. Also all records and books of accounts.

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[fol. 33]

Sinking Funds.

| | |
|---|---|
| Cash in hands of Trustee for Sinking Fund purposes: | |
| Central Hanover Bank & Trust Co., N. Y., under Detroit & Chicago Extension Mortgage | $ 373.53 |
| **Deposits in Lieu of Mortgage Property Sold.** | |
| Cash in hands of Central Hanover Bank & Trust Co., Trustee of First Mortgage Wabash R. R. Co., account deposit in lieu of mortgage property sold | 26,240.18 |
| **Rails and Fastenings Leased.** | |
| Leased to Jennison Wright, Toledo, Ohio | $ 756.39 |
| Leased to Cooley Gravel Co., Sampsel, Mo | 1,001.12 |
| Leased to Missouri Valley Bridge and Iron Co., St. Charles, Mo | 3,058.50 |
| | 4,816.01 |

Securities.

| Stocks as follows: | No. Shares | Par Value |
|---|---|---|
| Ann Arbor R. R. Co., The—Preferred. | 1,100 | $ 110,000.00 |
| Ann Arbor R. R. Co., The—Common. | 721 | 72,100.00 |
| Belt Railway Co. of Chicago | 2,400 | 240,000.00 |
| Brunswick & Chillicothe R. R. Co. | 4,340 | 434,000.00 |
| Des Moines Union Railway Co. | 1,500 | 150,000.00 |
| Detroit and Western Railway | 500 | 50,000.00 |
| Fort Wayne & Detroit R. R. Co. | 270 | 27,000.00 |
| Fort Wayne Union Railway Co. | 200 | 20,000.00 |
| Green Real Estate Company | 23,700 | No Par Value |
| Hannibal Bridge Company | 721 | 72,100.00 |
| Hannibal Union Depot Company | 80 | 8,000.00 |
| K. C. Excelsior Spgs. & Nor. Ry., Co. | 1,000 | 100,000.00 |

| | | | |
|---|---|---|---|
| Kansas City Terminal Railway Co. | 5 | 500.00 | |
| Kansas, Oklahoma and Gulf Ry. Co. | 6 | 600.00 | |
| Keokuk Union Depot Company | 200 | 20,000.00 | |
| Lake Erie & Fort Wayne R. R. Co. | 4,000 | 100,000.00 | |
| Mo. & Ill. Bridge & Belt R. R. Co. | 130 | 13,000.00 | |
| Railway Express Agency, Inc. | 12 | No Par Value | |
| St. L., Coun. Bluffs & Omaha R.R.Co. | 7,299 | 729,900.00 | |
| Terminal R. R. Assn. of St. Louis | 2,058 | 205,800.00* | |
| Toledo & Chicago R. R. Co. | 250 | 25,000.00 | |
| Toledo and Western Railway Co. | 1,000 | 100,000.00 | |
| Toledo Central Station Ry. Co. | 1,000 | 100,000.00 | |
| Wabash Motor Transit Co. | 1,000 | No Par Value | |
| Wheeling & Lake Erie Ry. Co. | 3,316 | 331,657.20 | |
| Wabash Ry. Co.—Common and Scrip. | 1,156 | 115,661.08 | |
| Wabash Ry. Co.—Pref. "A" and Scrip | 1,222 | 122,206.58 | |
| Wabash Ry. Co.—Preferred "B" | 1,344 | 134,400.00 | 3,281,924.86 |

† Includes 1,000 shares held in escrow by Iowa-Des Moines National Bank and Trust Co., Trustee, as per agreement with Chicago, Milwaukee, St. Paul & Pacific Railroad Co.

*Represents membership in Terminal R. R. Association of St. Louis. Not transferable.

[fol. 34]

| Bonds as follows: | No. Bonds | Par Value | |
|---|---|---|---|
| Chicago & Western Indiana R. R. Co. Consolidated Mortgage Bonds | 5 | $ 5,000.00 | |
| Fort Wayne Union Ry. Co. General Mortgage Bonds, Series "A" | 24 | 24,000.00 | |
| Manistique & Lake Superior R. R. Co. First Mortgage Bonds | 1,100 | 1,100,000.00 | |
| Chicago, Peoria & St. Louis Ry. Co. | | 10,432.80 | |
| The Wabash Railroad Co. First Mortgage Bond scrip—Due Bill | | 101.99 | |
| The Wabash Railroad Co. Second Mortgage Bond scrip—Due Bill | | 146.75 | |
| Detroit and Chicago Extension First Mortgage Bonds | 57 | 57,000.00 | |
| The Wabash Railroad Co. First Lien Terminal Gold Bond—Due Bill | | 689.23 | |
| The Wabash Railroad Co. Debenture Bonds, Series "B" and scrip | 1 | 10,200.00 | $1,207,570.77 |
| Notes as follows: | | | |
| Kansas City Terminal Ry. Co. | | $ 30,266.23 | |
| City of East St. Louis, Ill. Certificate of Interest | | 1,000.00 | 31,266.23 |

## Securities Pledged.

| Stocks as follows: | No. Shares | Par Value | |
|---|---|---|---|
| Chase National Bank, Trustee, Wabash Ry. Co. Refunding & General Mortgage: | | | |
| The Ann Arbor R. R. Co. Preferred | 38,582 | $3,858,200.00 | |
| The Ann Arbor R. R. Co. Common | 31,689 | 3,168,900.00 | |
| Green Real Estate Co | 120,000 | No Par Value | |
| Wabash R. R. Co. First Mortgage, Second Mortgage, Debenture Mortgage and Wab. Ry. Co. Refunding & General Mortgage, held by New York office of Wabash Ry. Co.: | | | |
| Chicago & Western Indiana R. R. Co | 10,000 | 1,000,000.00 | |
| New York Trust Co., Trustee, under Des Moines Division Mortgage: | | | |
| Des Moines & St. Louis R. R. Co | 20,000 | 2,000,000.00 | |
| Des Moines Union Ry. Co | 500 | 50,000.00 | |
| Moulton, Albia & Des Moines R. R. Co | 100 | 10,000.00 | |
| Pioneer Trust Co., Kansas City, Trustee under Kansas City Terminal Stock Trust Agreement: | | | |
| Kansas City Terminal Ry. Co. | 1,828⅓ | 182,833.33 | |
| Central Hanover Bank & Trust Co., New York, for equal and pro rata benefit of holders of Wabash Ry. Co. Notes amounting to $9,750,000.00 due Aug. 19, 1932: | | | |
| American Refrigerator Transit Co. | 1,217 | 121,700.00 | |
| Lehigh Valley R. R. Co | 258,929 | 12,946,450.00 | |
| New Jersey, Indiana & Illinois R. R. Co | 8,250 | 825,000.00 | $24,163,083.33 |

| [fol. 35] Bonds as follows: | No. Bonds | Par Value |
|---|---|---|
| Chase National Bank, Trustee, Wabash Ry. Co. Refunding & General Mortgage: | | |
| The Ann Arbor R.R.Co. Improvement & Extension Mortgage Bonds | 2,165 | $2,165,000.00 |
| The Wabash R.R.Co. Debenture Bonds, Series "B" and Scrip | 119 | 1,037,924.00 |

| | | | |
|---|---|---|---|
| Central Hanover Bank & Trust Co., New York, for equal and pro rata benefit of holders of Wabash Ry. Co. Notes amounting to $9,750,000.00 due August 19, 1932: | | | |
| The Wabash R.R.Co. First Lien Terminal Gold Bonds | 508 | 508,000.00 | $3,710,924.00 |

*******

Dated February 26, 1932.

Respectfully submitted,
WALTER S. FRANKLIN and
FRANK C. NICODEMUS, JR.,
Receivers, Wabash Railway Company.
By Walter S. Franklin,
One of the Receivers.

Clerk's Note: This copy is restricted as per praecipe of appellant.

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[fol. 36] (Resignation of Walter S. Franklin as Receiver.)

Wabash Railway Company
Railway Exchange Building

St. Louis, Mo.,

October 19, 1933.

Walter S. Franklin,
Frank C. Nicodemus, Jr.,
Receivers,

9704.

Honorable Charles B. Davis,
United States District Judge,
St. Louis, Missouri.

Dear Sir:—

As I have explained to you in conference I have been elected by the Board of Directors of The Pennsylvania Railroad to the position of Vice-President in Charge of Traffic. The reasons which lead me to accept this appointment have been fully explained and accepted by you as sufficient under the circumstances.

I, therefore, tender my resignation as one of the Receivers of the Wabash Railway Company.

It has been an honor and a pleasure to serve as one of your Receivers and I retire with many regrets.

Yours very truly,

WALTER S. FRANKLIN.

Filed Oct. 19, 1933. Jas. J. O'Connor, Clerk.

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[fol. 37] (Order Accepting Resignation of Walter S. Franklin as Receiver.)

Walter S. Franklin, by letter dated October 19th, 1933, having tendered his resignation as one of the Receivers of Wabash Railway Company appointed by order of this Court dated December 1, 1931, and due deliberation having been had thereon, it is

Ordered, Adjudged and Decreed by the Court:

That the resignation of Walter S. Franklin as one of the Receivers of Wabash Railway Company, tendered by letter dated October 19th, 1933, herewith filed, be and the same is hereby accepted, jurisdiction as to the matter of final compensation being hereby reserved.

CHARLES B. DAVIS,
District Judge.

Dated October 1933.

Filed Oct. 19, 1933. Jas. J. O'Connor, Clerk.

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[fol. 38] (Order Appointing Norman B. Pitcairn as Receiver in the place of Walter S. Franklin.)

The Court having this day accepted the resignation of Walter S. Franklin, one of the two Receivers heretofore appointed in this cause by order filed December 1, 1931, and it being represented to the Court that it is for the best interest of the receivership estate that a successor Receiver be appointed to serve with the remaining Receiver, and on motion of the Complainant and the Defendant, Wabash Railway Company appearing by counsel and assenting thereto, and due deliberation being had, it is:

Ordered, Adjudged and Decreed by the Court:

That Norman B. Pitcairn be and he is hereby appointed Receiver to serve with Frank C. Nicodemus, Jr., of all and singular the railroads, lands, property, assets, rights and franchises of Wabash Railway Company, of which Walter S. Franklin and Frank C. Nicodemus, Jr., were appointed Receivers by order of this Court filed and entered on December 1, 1931, and more particularly mentioned or described or referred to in said order, reference thereto being hereby had and made; and it is

Further Ordered, Adjudged and Decreed by the Court:

That each and every provision of each and all orders of this Court heretofore entered herein shall extend and apply to the Receiver hereby appointed so that said Receiver shall have and possess and be entitled to exercise any and [fol. 39] all powers granted to and be required to perform all duties imposed upon the Receivers heretofore appointed by this Court as fully and to the same extent as if said Norman B. Pitcairn instead of Walter S. Franklin had been originally appointed and named as one of the Receivers in this cause; and it is

Further Ordered, Adjudged and Decreed by the Court:

That the Receiver hereby appointed is required within ten (10) days from this date to be substituted as one of the principals in the place and stead of Walter S. Franklin in the bond heretofore executed by Walter S. Franklin and Frank C. Nicodemus, Jr., and filed herein December 3, 1931.

CHARLES B. DAVIS,
District Judge.

Dated October , 1933.

Filed Oct. 19, 1933. Jas. J. O'Connor, [Clker].

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[fol. 40] Partial Report of Forrest C. Donnell, Special Master.

(Filed Mar. 7, 1936.)

Comes now Forrest C. Donnell, the duly appointed and Acting Special Master in the above-entitled cause, and presents to the Court this partial report, as follows:—

Paragraph One.

That he did give, to each claimant in Paragraph Three hereof mentioned, proper and timely notice of the time and place in the City of St. Louis, Missouri, when such claimant would be given an opportunity to present and make proof, before said Special Master, of the amount of the respective claim of said claimant and the lien and priority, if any, thereof and to present the objections, if any, of such claimant to the allowance of claims of other creditors presented to said Special Master; and further that all the solicitors of record in this cause were given timely notice of the time and place of each of said hearings.

[fol. 41] Paragraph Two.

That he submits to the Court the following:—

3. In the matter of the claim of Peter J. Carpenter, Claimant.

This claim is based upon a judgment in the amount of $15,000.00, with interest, which judgment was entered on the 13th day of February, 1931, in the Circuit Court of the City of St. Louis, Missouri and from which judgment an appeal was taken by Wabash Railway Company to the Supreme Court of the State of Missouri. Pursuant to the mandate of the Supreme Court of Missouri, the Circuit Court of the City of St. Louis did on July 6, 1934 order that the verdict and judgment theretofore rendered in favor of the plaintiff for the sum of $15,000.00 be set aside and vacated and for naught held and that a new judgment be rendered in favor of Claimant and against Wabash Railway Company as of February 13, 1931 in the sum of $10,000.00; and said Circuit Court did on the 6th day of July, 1934 accordingly adjudge that Claimant have and recover of the Wabash Railway Company the sum of $10,000.00 with interest thereon at the rate of 6% per annum from February 13, 1931 until paid, together with the costs of the suit wherein said judgment was rendered. A certified copy of the judgment of said Circuit Court rendered July 6, 1934 was filed with this Special Master. Counsel appearing on behalf of Wabash Railway Company and on behalf of the

Receivers of said last mentioned Company did before this Special Master agree that the claim of said Claimant be allowed as set out in said judgment of July 6, 1934.

[fol. 42] Paragraph Three.

That this Special Master has considered the claim of each Claimant named in this Paragraph Three, and, being fully advised in the premises, hereby concludes that each said claim to the extent and in the sum below set out opposite the name of the Claimant who or which makes such claim is correct and valid and should be allowed in said respective sum as a general unsecured claim, that judgment should be entered thereon in the above entitled cause in favor of said claimant and against defendant Wabash Railway Company in said sum, and that said claim is not entitled to any lien or to any priority over other general unsecured claims; and that said Special Master has, subject to such if any objections to the allowance of such claim that may after the date of the filing of this report be presented by any person entitled to present the same, determined that he shall and he hereby does report to the Court (a) that to the extent and in the sum below set out respectively opposite the name of the Claimant who or which makes such claim, each such claim is correct and valid and should be allowed in said respective sum as a general unsecured claim, and that judgment should be entered thereon in the above entitled cause in favor of said claimant and against defendant Wabash Railway Company in said sum, the names of said claimants and said sum so respectively set out opposite the name of each, being as follows, to-wit:

| Name of Claimant | Sum |
|---|---|
| Peter J. Carpenter | $10,587.15 |

(b) that no one of said claims is entitled to any lien or to any priority over other general unsecured claims, and (c) that this report is made without prejudice to the said Annie Winn, Administratrix of the Estate of George Winn, deceased, to renew her claim for priority if leave of court to renew the same be granted her.

[fol. 43] Paragraph Four.

That herewith filed is a transcript of the proceedings before this Special Master with respect to the claim of each claimant in Paragraph Three hereof mentioned.

Dated this 7th day of March, 1936.

FORREST C. DONNELL,
Special Master.

Clerk's Note: The foregoing copy of original, restricted as per praecipe.

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[fol. 44] (Record Entry of Filing of Bill of Complaint of Chase National Bank of New York, as Trustee; Causes Nos. 9704 and 12099 consolidated; Norman B. Pitcairn, et al., appointed as Receivers in consolidated cases.)

Before Judge Davis—Court No. 1.

March 1, 1937.

Now comes the plaintiff, and by leave of the Court files herein, its bill of complaint, as trustee under Wabash Railroad Company Refunding and General Mortgage, dated January 1, 1925.

And now the separate entry of appearance is filed by defendants Wabash Railway Company, Norman B. Pitcairn and Frank C. Nicodemus, Receivers of Wabash Railway Company, and T. J. Moss Tie Company.

And now upon petition of plaintiff this day filed and presented, order is filed and entered consolidating causes No. 9704 and 12099, as consolidated cause 12099 and appointing Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers in said Consolidated cause, etc.

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[fol: 45] (Order Consolidating Cases Nos. 9704 and 12099 and Appointing Norman B. Pitcairn, et al., as Receivers in Consolidated Cases.)

Order No. 409.

In the District Court of the United States For the Eastern District of Missouri, Eastern Division.

T. J. Moss Tie Company, Complainant,
No. 9704. vs. In Equity.
Wabash Railway Company, Defendant.

The Chase National Bank of the City of New York, as Trustee, Plaintiff,
No. 12,099. vs. In Equity.
Wabash Railway Company, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, and T. J. Moss Tie Company, Defendants.

Upon consideration of the petition of The Chase National Bank of the City of New York, as trustee under Wabash [fol. 46] Railway Company Refunding and General Mortgage dated January 1, 1925, filed herein, it is hereby

Ordered, Adjudged and Decreed by the Court:

1. That said The Chase National Bank of the City of New York (hereinafter called the Chase National Bank), as trustee under the Refunding and General Mortgage dated January 1, 1925 (hereinafter called the Refunding and General Mortgage), of Wabash Railway Company (hereinafter called the Railway Company), is granted permission to appear specially in the above entitled cause No. 9704 for the sole purpose of filing and being heard on its petition for an order appointing receivers, consolidating causes, and granting other relief.

2. That Norman B. Pitcairn and Frank C. Nicodemus, Jr., heretofore appointed in the above entitled cause No. 9704 receivers of all the property of the Railway Company, real, personal and mixed, of whatever kind or description and wherever situated, be and hereby are appointed in the above entitled cause No. 12,099 receivers of all the property of the Railway Company, real, personal and mixed, of whatever kind or description and wherever situated (other than

the bonds, shares of stock and indebtedness pledged with and now in the possession of said petitioner, as trustee under the Refunding and General Mortgage, or conveyed, transferred and assigned to said petitioner, as trustee as aforesaid, by indentures supplemental to the Refunding and General Mortgage), subject to the lien of the Refunding and General Mortgage, and of the income from said property.

[fol. 47] 3. That said Norman B. Pitcairn and Frank C. Nicodemus, Jr., as receivers as aforesaid of all of said property of the Railway Company subject to the lien of the Refunding and General Mortgage, be and hereby are vested with all the powers conferred upon them in and by the orders of their appointment as receivers in the above entitled cause No. 9704.

4. That the bond heretofore given by said Receivers in the above entitled cause No. 9704 for the faithful performance of their duties shall extend to and cover the liability of said Receivers as receivers as aforesaid of said property of the Railway Company subject to the lien of the Refunding and General Mortgage, upon the filing in the office of the Clerk of this Court of the consent thereto of the surety thereon, as well as the consent of said Norman B. Pitcairn and Frank C. Nicodemus, Jr., as receivers.

5. That said Receivers shall segregate and sequester for the benefit of the Chase National Bank, as trustee under the Refunding and General Mortgage, and of the holders of the bonds outstanding thereunder, all the income from said property subject to the lien of the Refunding and General Mortgage, and apply the same to and for their benefit, subject only to such expenses and other uses as may lawfully and properly be incurred in the operation and preservation of said property, having due regard for the rights of said trustee and of the holders of said bonds, and for the protection of the security of the lien of the Refunding and General Mortgage.

6. That the above entitled causes, to-wit, cause No. 9704 and cause No. 12,099, be and hereby are consolidated into [fol. 48] one cause and hereafter shall proceed under the following number and style, to-wit:

The Chase National Bank of the City of New York, as Trustee, Plaintiff,
No. 12,099. vs. In Equity.
Wabash Railway Company, et al., Defendants.
Consolidated Cause.

7. That the appointment hereby of said Norman B. Pitcairn and Frank C. Nicodemus, Jr., as receivers as aforesaid of all said property subject to the lien of the Refunding and General Mortgage is without prejudice to the right of the Chase National Bank, as trustee as aforesaid, or of any holder or holders of the bonds outstanding under the Refunding and General Mortgage, to take any action to which their respective interests would otherwise entitle them.

Dated 3-1, 1937.

CHARLES B. DAVIS,
District Judge.

Filed Mar. 1, 1937. Jas. J. O'Connor, Clerk.

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[fol. 49] (Record Entry of Granting of Leave to Central Hanover Bank and Trust Company to file Petition for Leave to file Bill of Complaint.)

November 1, 1937.

Now upon petition of Central Hanover Bank & Trust Co., as trustee under the First Mortgage of the Wabash Railway Co., dated May 1, 1889, this day filed and presented, order filed and entered granting said petitioner leave to file bill of complaint.

Now comes Central Hanover Bank & Trust Company, as trustee under the First Mortgage of the Wabash Railroad Co., dated May 1, 1889, by its solicitor, and files and presents to the Court its petition for order consolidating causes Nos. 9704 and 12099 and 12357, and order filed and entered appointing Norman B. Pitcairn and Frank C. Nicodemus, Jr., as receivers of Wabash Railway Company, and consolidating causes Nos. 9704, 12099 and 12357, as consolidated cause No. 12099.

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[fol. 50] (Order Consolidating Cases Nos. 9704, 12099 and 12357 as Consolidated Case No. 12099 and appointing Norman B. Pitcairn, et al., as Receivers in such Consolidated Cause.)

Order No. 460.

In the District Court of the United States For the Eastern District of Missouri, Eastern Division.

The Chase National Bank of the City of New York, as Trustee, Plaintiff,
No. 12,099. vs. In Equity.
Wabash Railway Company, et al., Defendants.

Central Hanover Bank and Trust Company, as Trustee under the First Mortgage of The Wabash Railroad Company, dated May 1, 1889, Complainant,
No. 12,357. vs. In Equity.
Wabash Railway Company, Manufacturers Trust Company, as Successor Trustee under the Second Mortgage of The Wabash Railroad Company, dated February 1, 1889, Bankers Trust Company, as Successor Trustee under the Debenture Mortgage of The Wabash Railroad Company, dated July 1, 1889, and The Chase National Bank of the City of New York, as Trustee under the Refunding and General Mortgage of Wabash Railway Company, dated January 1, 1925, Defendants.

Consolidated Cause.

And in Constituent Causes in Equity Nos. 9,704 and 12,099.

[fol. 51] This cause came on further to be heard at this term and was argued by counsel; and thereupon upon consideration thereof it was

Ordered, Adjudged and Decreed as follows:

1. That Central Hanover Bank and Trust Company, as Trustee under the First Mortgage of The Wabash Railroad Company, dated May 1, 1889, be and it hereby is granted leave to appear specially in the above entitled consolidated cause in Equity No. 12,099 and in the constituent causes thereof for the purpose of filing its petition verified No-

vember 1, 1937, for an order consolidating causes and other relief.

2. That Norman B. Pitcairn and Frank C. Nicodemus, Jr., heretofore appointed in constituent cause in equity No. 9,704 Receivers of all of the property of Wabash Railway Company and hertofore appointed in constituent cause in equity No. 12,099 Receivers of all the property of Wabash Railway Company subject to the lien of the Refunding and General Mortgage dated January 1, 1925, of Wabash Railway Company under which The Chase National Bank of the City of New York as trustee (other than the bonds, shares of stock and indebtedness pledged with and now in the possession of, or conveyed, transferred and assigned to, said trustee), be and they hereby are appointed in the above entitled cause No. 12,357 Receivers of all and singular the property, real, personal and mixed, of whatsoever [fol. 52] kind and description and wheresoever situate covered by and embraced in said First Mortgage as a lien prior and superior to the lien of said Refunding and General Mortgage (other than the securities and cash held by Central Hanover Bank and Trust Company as Trustee thereunder) and of all the tolls, rents, revenues, income, issues and profits thereof, with the usual powers of receivers in such cases and with full power and authority to enter upon, take possession of and manage, operate and control all of the lines of railroad or other property, real, personal and mixed, so covered by and embraced in said First Mortgage and to collect and receive the tolls, rents, revenues, income, issues and profits thereof.

3. That the bond heretofore given by said Receivers in said cause in equity No. 9,704 for the faithful performance of their duties shall extend to and cover the liability of said Receivers as Receivers as aforesaid of the property so covered by and embraced in said First Mortgage, upon the filing in the office of the Clerk of this Court of the consent thereto of the surety thereon, as well as the consent of said Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers.

4. That the above entitled cause in equity No. 12,357 be and it hereby is consolidated with the above entitled consolidated cause in equity No. 12,099 and with the con-

stituent causes thereof and said consolidated cause in equity No. 12,099 shall hereafter continue under the following number and style:

[fol. 53] The Chase National Bank of the City of New York, as Trustee, Plaintiff,
No. 12,099. vs. In Equity.
Wabash Railway Company, et al., Defendants.

Consolidated Cause.

5. The court reserves for later determination the question of the sequestration and impounding of the income from the property subject to said First Mortgage.

Dated November 1, 1937.

CHARLES B. DAVIS,
United States District Judge.

Filed Nov. 1, 1937. Jas. J. O'Connor, Clerk.

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[fol. 55] Supplemental Order On Bill of Complaint of Central Hanover Bank and Trust Company, as Trustee Under the First Mortgage of the Wabash Railway Company, Dated May 1, 1889.

Order No. 462.

Upon further consideration of the Bill of Complaint of the Central Hanover Bank and Trust Company, as Trustee under the First Mortgage of the Wabash Railway Company, dated May 1, 1889, and the Court being fully advised in the premises, it is:

Ordered, Adjudged and Decreed as follows:

That Central Hanover Bank and Trust Company, as Trustee under said First Mortgage, is entitled to have all the tolls, rents, revenues, income, issues and profits, of all of the property of Wabash Railway Company subject to the lien of said First Mortgage, as a lien prior and superior to the lien of said Refunding and General Mortgage sequestered and impounded for its benefit and for the benefit of the holders of the Bonds outstanding under said First Mortgage from and after October 31, 1937, and said Receivers be and they hereby are directed to sequester and

impound for the benefit of Central Hanover Bank and Trust Company as Trustee as aforesaid, and the holders of the Bonds outstanding under said First Mortgage, all the tolls, rents, revenues, income, issues and profits of said property and every part thereof subject to the lien of the First Mortgage as a lien prior and superior to the lien of said Refunding and General Mortgage and, after deducting the expenses of operating said lines of railroad and other property so covered by said First Mortgage and the cost of all improvements made and all taxes that may accrue thereon as well as just and reasonable compensation [fol. 56] for the services and expenses of the Complainant in the above entitled cause in equity No. 12,357 in and about the premises, apply the same, when and as directed by order or orders of this Court hereafter to be entered, ratably to the payment of the interest on said Bonds in the order in which the same shall have become due, all as provided in said First Mortgage, or otherwise for the benefit of the Central Hanover Bank and Trust Company, as Trustee as aforesaid, and the holders of the Bonds outstanding under said First Mortgage; provided, however, that the Receivers shall not be required to make an actual segregation on their books of the tolls, rents, revenues, income, issues and profits so impounded unless and until so directed by further order of this Court.

Dated November 4, 1937.

CHARLES B. DAVIS,
United States District Judge.

Filed Nov. 4, 1937. Jas. J. O'Connor, Clerk.

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[fol. 57] (Notice of Peter J. Carpenter for Leave to File Petition for Order Terminating Receivership of Wabash Railway Company, etc.)

(Filed January 26, 1938.)

In the District Court of the United States For the Eastern Division of the Eastern Judicial District of Missouri.

T. J. Moss Tie Company, Complainant,

vs.

Wabash Railway Company, Defendant.

(Constituent Cause In Equity No. 9704.)

The Chase National Bank of the City of New York, as Trustee, Complainant,
No. 12,099. vs. In Equity.
Wabash Railway Company, et al., Defendants.

(Constituent Cause In Equity No. 12,099.)

Central Hanover Bank & Trust Company, as Trustee under the First Mortgage of the Wabash Railroad Company, dated May 1, 1889, Complainant,
vs.
Wabash Railway Company, et al., Defendants.

(Constituent Cause In Equity No. 12,357.)

Consolidated Cause.

[fol. 58] To: T. J. Moss Tie Company or Williams, Nelson & English, Its Counsel of Record,

Wabash Railway Company or Nat S. Brown, Its Counsel of Record,

The Chase National Bank of the City of New York or Nagel, Kirby, Orrick & Shepley, Its Counsel of Record,

Central Hanover Bank & Trust Company or Fordyce, White, Mayne, Williams & Hartman,

Frank C. Nicodemus and Norman B. Pitcairn, Receivers of Wabash Railway Company or Nat S. Brown, Their General Counsel.

You Are Hereby Advised, that on January 26th, 1938, at 10:00 o'clock in the forenoon, or as soon thereafter as Counsel can be heard, Peter J. Carpenter, by his counsel, will, in Division No. 1 of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, present to the Court, in the above entitled Consolidated Cause, his Application, (a copy of which is hereto attached) for leave to file in the above entitled Consolidated Cause, his Petition, (a copy of which is here-

to attached) for an Order terminating the receivership of Wabash Railway Company and dissolving temporary restraining order and injunction.

HYMAN G. STEIN,
MARK D. EAGLETON,
(By H. G. S.)
Attorneys for Peter J. Carpenter.

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Copy of the above Notice and of the Application and of the Petition therein mentioned received this 25th day of January, 1938.

HOMER HALL,
Attorney for Wabash Railway Co.
per Strasser,

FORDYCE, WHITE, MAYNE,
WILLIAMS & HARTMAN,
Attorneys for Central Hanover Bank & Trust Co.
By G. C. Stribling,

Attorneys for T. J. Moss Tie Co.

NAGEL, KIRBY, ORRICK & SHEPLEY,
Attorneys for The Chase National Bank of the City of New York.

N. S. BROWN,
Attorney for Frank C. Nicodemus and Norman B. Pitcairn, Receivers.
per L. S. Strasser.

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[fol. 59] State of Missouri,
City of St. Louis.—ss.:

David L. Houghtlin, of lawful age, being duly sworn, upon his oath states that he served a true copy of the within Notice, Application and Petition of Peter J. Carpenter for leave to file his Petition For Order Terminating Receivership of Wabash Railway and Dissolving Temporary Restraining Order and Injunction, on and within named T. J. Moss Tie Company, a corporation, this 25th day of

January, 1938, by delivering a copy of said Notice, Application and Petition to A. W. Taylor, Secretary of said T. J. Moss Tie Company, he being in the usual business office of said T. J. Moss Tie Company in the Security Building in the City of St. Louis, Missouri.

DAVID L. HOUGHTLIN.

Subscribed and sworn to before me this 25th day of January, 1938.

(Seal) HARRY SHAPIRO, JR.,
Notary Public.

My commission expires March 25, 1938.

[fol. 60] State of Missouri,
City of St. Louis.—ss.:

William George, being duly sworn, upon his oath states that he delivered a copy of the attached and foregoing "Notice, Application and Petition", this 25th day of January, 1938, to Messrs. William, Nelson and English, by leaving a copy with Richard S. Jones at the office of the said Williams, Nelson and English, Boatmens' Bank Building, St. Louis, Missouri; neither Fred Williams, Earl Nelson or Fred English being in their offices.

WILLIAM GEORGE.

Subscribed and sworn to before me this 25th day of January, 1938.

(Seal) HARRY SHAPIRO, JR.,
Notary Public.

My commission expires March 25, 1938.

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[fol. 61] Application of Peter J. Carpenter For Leave to File His Petition For Order Terminating Receivership of Wabash Railway Company and Dissolving Temporary Restraining Order and Injunction.

(Filed Jan. 26, 1938.)

In the District Court of the United States For the Eastern Division of the Eastern Judicial District of Missouri.

T. J. Moss Tie Company, Complainant,

vs.

Wabash Railway Company, Defendant.

(Constituent Cause In Equity No. 9704.)

The Chase National Bank of the City of New York, as Trustee, Complainant,
No. 12,099. vs. In Equity.
Wabash Railway Company, et al., Defendants.

(Constituent Cause In Equity No. 12,099.)

Central Hanover Bank & Trust Company, as Trustee under the First Mortgage of the Wabash Railroad Company, dated May 1, 1889, Complainant,
vs.
Wabash Railway Company, et al., Defendants.

(Constituent Cause In Equity No. 12,357.)

Consolidated Cause.

Now comes Peter J. Carpenter, hereinafter referred to [fol. 62] as "Petitioner", and represents to this Honorable Court:—

I.

On February 15th, 1929, while engaged in the course of his employment as a laborer for Wabash Railway Company (hereinafter referred to as "Railway Company"), Petitioner sustained personal injuries.

Thereafter, Petitioner, in a suit instituted by him in the Circuit Court of the City of St. Louis, Missouri, and styled "Peter J. Carpenter versus Wabash Railway Company, a corporation, Cause No. 142,443-B", sought and prayed a judgment against Railway Company for damages resulting from such injuries, and on February 13th, 1931, the Petitioner did, in said Cause and in said Circuit Court of the City of St. Louis, Missouri, recover a judgment against Wabash Railway Company in and for the sum and amount of Fifteen Thousand Dollars ($15,000.00).

Thereafter, the Wabash Railway Company having taken an appeal from said judgment, to the Supreme Court of Missouri, the said judgment was by the Supreme Court of Missouri duly affirmed upon condition of a remittitur in the sum of $5,000, being agreed to by Petitioner and entered in said Cause, and the Petitioner did agree to such remittitur, and thereupon the said Circuit Court of the City of St. Louis, Missouri, pursuant to said ruling and

judgment of the Supreme Court of Missouri, and in obedience to a mandate of the Supreme Court of Missouri in said cause, did, on July 6, 1934 modify said judgment so recovered by the Petitioner, by entering judgment in favor of the Petitioner and against Wabash Railway Company as of February 13, 1931, in the sum of $10,000., with interest thereon at the rate of 6% per annum from February 13, 1931, until paid, together with the costs of the suit wherein said judgment was rendered. Said judgment in the sum of $10,000., together with interest thereon and costs of court as aforesaid, was, on February 13, 1931, and ever [fol. 63] since has been, and is, a final judgment and due unto Petitioner, and no part thereof has been paid.

II.

At the time Petitioner recovered said judgment, Railway Company was and still is the owner of real property in the City of St. Louis, Missouri, of the reasonable value of more than $800,000.00 and under the applicable laws and statutes of Missouri, Petitioner, by reason of and as the owner of said judgment, did on October 29, 1931, acquire and ever since has had and still has a lien upon all real property in the City of St. Louis, Missouri, owned by Railway Company on October 29, 1931, or any time thereafter. On and since October 29, 1931, Railway Company, was and is the owner of real property of great value and located in Missouri elsewhere than the City of St. Louis.

III.

On December 1st, 1931, in the above entitled Constituent Cause No. 9704, in Equity, wherein T. J. Moss Tie Company is Complainant and the above named Wabash Railway Company, a corporation, is Defendant, this Honorable Court did, by its order and judgment in said Constituent Cause, appoint receivers of all of the railways and property of Railway Company, and further ordered that "all .....persons.....be, and they are hereby restrained and enjoined from interfering with, attaching, levying upon, or in any manner whatsoever disturbing any portion of the

property and premises of which receivers are hereby appointed . . . . .".

Following the filing of the other of the above named Constituent Causes, the said receivership was, by the order of this Honorable Court, extended, as will appear from the files and records herein. The receivers heretofore appointed herein by this Honorable Court are still in pos-
[fol. 64] session and control of and operating all of the railways and property of Railway Company, including the property upon which the Petitioner, as such judgment creditor, has a lien, and are in possession of large sums of money derived from the possession and operation by them of the railways and property of Railway Company.

IV.

The Petitioner desires to file herein his Petition for an order terminating the said receivership of Wabash Railway Company and dissolving the said temporary restraining order and injunction, in the form of the Petition submitted herewith and designated "Petition of Peter J. Carpenter For Order Terminating Receivership of Wabash Railway Company and Dissolving Temporary Restraining Order and Injunction", reference to which Petition is hereby made for a statement of said Petition and the contents thereof and the orders therein and thereby sought by Petitioner.

Wherefore, your Petitioner prays that he be granted leave to file in this Consolidated Cause, in this Court, his said Petition presented herewith, and that an Order permitting the filing of said Petition be made forthwith.

HYMAN G. STEIN,
MARK D. EAGLETON,
(By H. G. S.)
Attorneys for Peter J. Carpenter, Petitioner.

[fol. 65] In the District Court of the United States For the Eastern Division of the Eastern Judicial District of Missouri.

T. J. Moss Tie Company, Complainant,
vs.
Wabash Railway Company, Defendant.

(Constituent Cause In Equity No. 9704.)

The Chase National Bank of the City of New York, as Trustee, Complainant,
No. 12,099. vs. In Equity.
Wabash Railway Company, et al., Defendants.

(Constituent Cause In Equity No. 12,099.)

Central Hanover Bank & Trust Company, as Trustee under the First Mortgage of the Wabash Railroad Company, dated May 1, 1889, Complainant,
vs.
Wabash Railway Company, et al., Defendants.

(Constituent Cause In Equity No. 12,357.)

Consolidated Cause.

Petition of Peter J. Carpenter For Order Terminating Receivership of Wabash Railway Company and Dissolving Temporary Restraining Order and Injunction.

Clerk's Note: (Leave to file denied as per decree filed.)

Comes now Peter J. Carpenter, hereinafter referred to [fol. 66] as "Petitioner", and represents to this Honorable Court:—

I.

As is hereinafter more fully set out, Petitioner, on February 13, 1931, and prior to the commencement of the receivership of Wabash Railway Company herein, did, in the Circuit Court of the City of St. Louis, Missouri, recover a judgment against Wabash Railway Company, on account of damages arising out of personal injuries sustained by him while engaged in the performance of his work and duties as an employee of Wabash Railway Company. Said judgment is now in the principal amount of

$10,000, and under the laws of the State of Missouri is, and at all times since the date thereof, to-wit: February 13, 1931, has been, a lien upon all real property owned by Wabash Railway Company in the City of St. Louis, Missouri at and since the time said judgment was recovered. At, and ever since the time said judgment was recovered, Wabash Railway Company owned and still owns real property located and situate in the City of St. Louis, Missouri, and having a reasonable value of more than $800,000., and which, since the time of their appointment herein, has been in the possession of the Receivers of Wabash Railway Company.

II.

The firm of Kuhn, Loeb & Company, an investment banking organization of New York, has since about 1887 been the banker for and of the Pennsylvania Railroad Company. The Wabash Railway Company was in receivership in 1911, and was re-organized in 1915 under the auspices of said Kuhn, Loeb & Company. In the course of such re- [fol. 67] organization, Kuhn, Loeb & Company obtained control of the Wabash Railway Company, and upon obtaining such control installed William H. Williams as President and Chairman of the Board of Directors of Wabash Railway Company. Relying upon information and belief, Petitioner states that said Kuhn, Loeb & Company had and exercised control of Wabash Railway Company and its financial policies and investments during the year 1926, and at the time Lehigh Valley Railroad Company stock was bought by Wabash Railway Company as hereinafter mentioned, and that the Pennsylvania Railroad Company participated and connived with said Kuhn, Loeb & Company in the course of conduct hereinafter mentioned, whereby Wabash Railway Company purchased and acquired Lehigh Valley Railroad Company stock, and that such acquisition and purchase by Wabash Railway Company of Lehigh Valley Railroad Company stock was brought about by and through the Pennsylvania Railroad Company and said Kuhn, Loeb & Company in connection with and as a part of a program whereby Kuhn, Loeb & Company and the Pennsylvania Railroad Company were undertaking to, and did, acquire for the Pennsylvania

Railroad Company stocks and working control of the Wabash Railway Company and the Lehigh Valley Railroad Company.

In about 1927 the Pennsylvania Railroad Company acquired, and since then has had and owned, approximately 48% of the voting stock of Wabash Railway Company, and thereby has had, and still has, and has exercised working control of Wabash Railway Company, and through the exercise of such control has named the officers, directors and managers of Wabash Railway Company.

[fol. 68] The Pennsylvania Railroad Company in acquiring Wabash Railway Company stock as herein mentioned did not obtain authority from the Interstate Commerce Commission to do so, and in fact did for a long period of time conceal from the Interstate Commerce Commission the fact that it had acquired such stock. Through its said stock ownership and working control of Wabash Railway Company, the said Pennsylvania Railroad Company did, at the time the receivership herein was commenced and for some years next prior thereto, maintain Frank C. Nicodemus, Jr., one of the Receivers herein, and Walter S. Franklin, a former Receiver herein, as Assistant General Counsel and as President respectively of Wabash Railway Company. At or about the time he was appointed receiver of Wabash Railway Company herein, and for some years prior thereto, Norman B. Pitcairn was President of the Detroit-Toledo and Ironton Railroad Company, a subsidiary of the Pennsylvania Railroad Company, and for some years prior to his having become President of said Detroit-Toledo and Ironton Railroad Company, the said Norman B. Pitcairn was a major executive or representative of the Pennsylvania Railroad Company.

III.

The Wabash Railway Company sustained losses of many millions of dollars, and its insolvency was largely caused by the purchase of Lehigh Valley Railroad Company stock, as hereinafter mentioned, and which stock purchases, as hereinafter mentioned, were fraudulent and unlawful and the result of a fraudulent and unlawful course of conduct practiced by persons controlling Wabash Railway Company as herein mentioned. Such fraudulent

conduct, with its enormous loss to Wabash Railway Company, has been generally known to the public for some [fol. 69] time, and has been fully exposed by and through an investigation by the Interstate Commerce Committee of the United States Senate, and was so shocking and contrary to law and equity that following the investigation of Wabash Railway Company, Pennsylvania Railroad Company, and other railroad companies, the Chairman of said Committee, upon the floor of the United States Senate, stated:

"Why, if any member of the Senate did what Mr. Williams, the President of the Wabash did, he would have found himself behind the bars."

and another United States Senator, who had served as an Acting Chairman of said Senate Committee, in substance denounced certain improper activities in connection with the reorganization of bankrupt railroads as

"the greatest racket on earth".

In the course of such investigation it was also established and made known to the public that in connection with the purchase by Wabash Railway Company of Lehigh Valley Railroad Company's stock as herein mentioned, the reports of Wabash Railway Company to the Interstate Commerce Commission were falsified and the books of Wabash Railway Company were so set up as to conceal such purchases.

IV.

Notwithstanding the foregoing facts and conditions, and the existence of the receivership of Wabash Railway Company for more than six years, no action has been taken by said receivers relative to the losses so sustained by Wabash Railway Company, and no action has been taken by them to recover from those responsible, the damages sustained by Wabash Railway Company by reason of the aforesaid improper and unlawful acts. By reason of their busi- [fol. 70] ness association, connection and affiliation with Pennsylvania Railroad Company as herein mentioned, and its improper exercise of control over Wabash Railway Company and its participation in said improper acts as herein mentioned, and by reason of their aforesaid failure

to take any action relative to the losses sustained by Wabash Railway Company as aforesaid, the present receivers herein, Frank C. Nicodemus, Jr., and Norman B. Pitcairn, are not proper persons to hold, and discharge the duties of the office of Receivers of Wabash Railway Company.

V.

Petitioner is informed and believes and therefore states that commencing on or about March 18th, 1926, said Kuhn, Loeb & Company and certain major officers and managers of Wabash Railway Company who were nominees of, and acting under the control of Kuhn, Loeb & Company, engaged in the following course of conduct, action and series of transactions:—

On March 18th, 1926, the Executive Committee of Wabash Railway Company, at a meeting at 10 Broadway, New York City, with the view and purpose of acquiring for Wabash Railway Company with assets of Wabash Railway Company, the effective control of Lehigh Valley Railroad Company, adopted a secret resolution which was withheld from the Minutes submitted to the Stockholders of Wabash Railway Company, and which conferred Carte Blanche powers upon said William H. Williams, President and Chairman of the Board of Directors of Wabash Railway Company, in connection with the acquisition and purchase of Lehigh Valley Railway Company stock.

Powers conferred by such resolution upon said William H. Williams was in the following language:

"The chairman be instructed to investigate and consider the advisability of acquiring the properties or securities, in whole or in part, of some other carrier or carriers, [fol. 71] and with authority, in the judgment and discretion of the chairman, to acquire for the company such securities and properties as he may deem advisable and in the best interests of the company, and may be able to obtain at prices deemed by him to be reasonable, and with further authority to use the funds of the company and, if necessary, to pledge its credit in the acquisition of such properties or securities or both."

For the purpose of screening and concealing the proposed purchases of Lehigh Valley Railroad Company stock, directors of Wabash Railway Company caused to be set up a special deposit at the Equitable Trust Company, a banking institution, with said William H. Williams and J. C. Otterson, Treasurer of Wabash Railway Company as Trustees. Lehigh Valley Railroad Company stock was then purchased through said Kuhn, Loeb & Company and C. D. Barney & Company, brokers of New York City. As further precautions to keep said purchase a secret, all sums of money passed during such transactions were in Cashiers' Checks, and the accounts were entered under designated numerals instead of in the name of Wabash Railway Company.

Purchases of Lehigh Valley Railroad Company stock began in May, 1926, and by December 31st of that year amounted to 58,800 shares, at a cost of $4,930,000. The Accounting Department of Wabash Railway Company in St. Louis, Missouri, was instructed to enter said sum of $4,930,000. among the assets of Wabash Railway Company under the head of "Special Deposit" although such sum had already been disbursed.

During January, 1927, the said Trustees made further purchases of Lehigh Valley Railroad Company stock, reaching a total of 19% of its outstanding shares, or 231,319 shares. More than $23,000,000.00 was paid for such shares of stock so purchased, and such cost continued to be carried on the St. Louis Books of the Wabash Railway Company as a "Special Deposit" until November, [fol. 72] 1927.

VI.

Petitioner is informed and believes and therefore states that the prices paid for Lehigh Valley Railroad Company stock purchased for and on behalf of Wabash Railway Company as aforesaid, were excessive and unreasonable, and that Wabash Railway Company now owns Lehigh Valley Railroad Company stock purchased as aforesaid at a cost of more than $23,000,000.00, and which, at the present time, has a quoted market value of less than $1,500,000.00.

Although the regulations of the Interstate Commerce Commission require that each railroad in its annual re-

port declare not only its total holdings in non-affiliated carriers, but its acquisition of such interest during the year in question, nevertheless the Wabash Railway Company did not, during 1926, disclose to the Interstate Commerce Commission its acquisitions during such year of Lehigh Valley Railroad Company stock, but did, in its 1927 Report to the Interstate Commerce Commission, for the first time, reveal its interest in the Lehigh Valley Railroad Company stock, but represented all the purchases of such stock as having been made during 1927.

Said Kuhn, Loeb & Company collected fees, commissions and profits in the sum of $1,047,782.00 on such transactions whereby Wabash Railway Company purchased and acquired Lehigh Valley Railroad Company stock as aforesaid.

In about January, 1927, Wabash Railway Company applied to the Interstate Commerce Commission for authority to issue its bonds in the principal amount of $15,500,000. and also applied to the New York Stock Exchange for authority to list for trading such bond issue which was floated through said Kuhn, Loeb & Company. In its Annual Report to the Stockholders for the year 1926, and in its said applications to the Interstate Commerce Commission [fol. 73] and the New York Stock Exchange relative to the issue of bonds as aforesaid, there was not disclosed the purchase by Wabash Railway Company as aforesaid, of Lehigh Valley Railroad Company stock, or the amounts owed by it to Kuhn, Loeb & Company for making such purchases, and balance sheets of Wabash Railway Company which were a part of such reports to its Stockholders and a part of such applications to the Interstate Commerce Commission and the New York Stock Exchange also failed to disclose and were so set up as to conceal such purchases of Lehigh Valley Railroad Company stock and amounts owed Kuhn, Loeb & Company in connection therewith.

Such acquisition and purchase for and on behalf of Wabash Railway Company of Lehigh Valley Railroad Company stock was without the knowledge or consent of, and without authority from the Interstate Commerce Commission, or the Stockholders of Wabash Railway Company, and was contrary to law and was contrary to and in violation

of the powers and duties of the officers of Wabash Railway Company participating therein, and resulted in losses to Wabash Railway Company aggregating many millions of dollars, and for such losses Kuhn, Loeb & Company and the others participating in said transactions as aforesaid are, and should be held liable unto Wabash Railway Company and those entitled to share in its assets and estate.

Relying upon information and belief, Petitioner states that Kuhn, Loeb & Company engaged in such course of conduct and series of transactions in utter disregard and violation of the rights and best interests of Wabash Railway Company, and for the purpose of advancing the selfish interest of itself and its associates in such conduct and transactions, and for the purpose of collecting and receiving fees and commissions and profits in excess of $1,000,000.00, and in such transactions Kuhn, Loeb & Company, at great profit to itself, sold to Wabash Railway Company stocks owned or purchased by Kuhn, Loeb & Company, and the officers and directors of Wabash Railway Company participating in such conduct and transactions did so pursuant to a conspiracy among themselves and Kuhn, Loeb & Company to so enable Kuhn, Loeb & Company to make such large profits at the expense of Wabash Railway Company.

[fol. 74] VII.

Petitioner is informed and believes and therefore states that the same interests which brought about such enormous losses to Wabash Railway Company, and which interests include Kuhn, Loeb & Company, the Pennsylvania Railroad Company, their nominees and persons under their control, are still in control of matters pertaining to securities of Wabash Railway Company, and have obtained and possess and are undertaking to exercise such powers as will permit them to direct the course of, and policies relating to, any reorganization of Wabash Railway Company, and it is only by such remedial legislation and supervision and exercise of powers of the Interstate Commerce Commission, as are provided for in Section 77 of the National Bankruptcy Act, that a proper accounting on behalf of the Wabash Railway Company and the protection of the creditors of Wabash Railway Company can be had.

VIII.

The claim of Petitioner on account of which he recovered judgment against Wabash Railway Company as aforesaid is more particularly described as follows:—

On February 15, 1929 Petitioner while engaged in the course of his employment as a laborer for Wabash Railway Company sustained personal injuries. Thereafter Petitioner in a suit instituted by him in the Circuit Court of the City of St. Louis, Missouri, and styled: "Peter J. Carpenter vs. Wabash Railway Company, a corporation, Cause No. 142443-B", sought and prayed a judgment against Wabash Railway Company for damages resulting from such injuries, and on February 13, 1931, the Petitioner did in said cause and in said Circuit Court of the City of St. Louis, Missouri, recover a judgment against Wabash Railway Company in and for the sum and amount of [fol. 75] $15,000. Thereafter, the Wabash Railway Company having taken an appeal from said judgment, to the Supreme Court of Missouri, the said judgment was by the Supreme Court of Missouri duly affirmed upon condition of a remittitur in the sum of $5,000 being agreed to by Petitioner and entered in said cause, and the Petitioner did agree to such remittitur, and thereupon the said Circuit Court of the City of St. Louis, Missouri, pursuant to said ruling and judgment of the Supreme Court of Missouri, and in obedience to a mandate of the Supreme Court of Missouri in said cause, did, on July 6, 1934 modify said judgment so recovered by the Petitioner, by entering judgment in favor of the Petitioner and against Wabash Railway Company as of February 13, 1931 in the sum of $10,000, with interest thereon at the rate of 6% per annum from February 13, 1931, until paid, together with the costs of the suit wherein said judgment was rendered. Said judgment in the sum of $10,000, together with interest thereon and costs of court as aforesaid, was, on February 13, 1931, and ever since has been, and is a final judgment and due unto Petitioner, and no part thereof has been paid.

IX.

As appears from the record herein (printed record page 351 et. seq.), this Honorable Court did by its order in the above mentioned constituent cause of T. J. Moss Tie Com-

pany, Complainant, vs. Wabash Railway Company, Defendant, Cause No. 9704 In Equity, on March 19, 1932, appoint Forrest C. Donnell, Special Master in said cause, and in such order this Honorable Court did order and provide as follows:

"In hearings before the special master he shall proceed in all respects according to the usage and practice in chancery in such cases.

"Before settling his report in any contested case, the special master shall give to the parties in interest reasonable notice of the time when and the place where he will finally settle such report, and of the fact that they may appear before him and file such exceptions to the same as they may desire. Any party to such a case, who feels ag- [fol. 76] grieved at the finding or decision of the special master may, at the time fixed by the special master for settling his report, file any such exceptions in writing to the same as may be deemed appropriate by such party, and no exception not so filed will be considered by the Court. The master will notify all parties interested in the matters presented by petitions in such cases of this fact."

Said order of March 19, 1932, is by this reference thereto hereby made a part hereof.

X.

On July 1, 1938 Petitioner filed his claim with said Special Master, and said claim is by this reference thereto hereby made part hereof. On August 26, 1935, the Petitioner's said claim was heard by and before the Special Master. Counsel appearing on behalf of Wabash Railway Company and on behalf of its receivers did at such hearing before said Special Master state:

"We agree further that the claim be allowed as set out in the judgment."

The Special Master has not given to the Petitioner or to his counsel any notice of the time when, and the place where, the Special Master would finally settle his report relative to such claim or of the fact that Petitioner might appear before him and file any exceptions to such report. Neither the Special Master nor this Honorable Court has

fixed any time, place or manner for or relative to the filing by the Petitioner of any exceptions which the Petitioner might desire to file to the report of the Special Master upon and relative to Petitioner's said claim.

This Honorable Court has not made any order relative to the time, place or manner for the filing of exceptions to any report of the Special Master by any claimant unto whom the Special Master shall not give or have given notice of the time when, and the place where, the Special Master would settle his report and of the fact that such claimant might appear before the Special Master and file such exceptions to any such report, as such claimant might [fol. 77] desire.

XI.

The Special Master, without any notice to the Petitioner or his counsel, filed a report in said constituent cause No. 9704, in substance setting forth that pursuant to the mandate of the Supreme Court of Missouri the Circuit Court of the City of St. Louis, Missouri rendered judgment in favor of Petitioner and against Wabash Railway Company as of February 13, 1931, for the sum of $10,000 with interest thereon at the rate of 6% per annum from February 13, 1931 until paid, together with the costs of the suit wherein said judgment was rendered, and that counsel appearing on behalf of Wabash Railway Company and on behalf of its receivers, did before said Special Master, agreed that the claim of the Petitioner be allowed as set out in the judgment which the Circuit Court of the City of St. Louis, Missouri had entered pursuant to said mandate from the Supreme Court of Missouri, and said Special Master in his said report did further report that he had "subject to such if any objections to the allowance of such claim that may after the date of the filing of this report be presented by any person entitled to present the same, determined that he shall, and he hereby does report to the Court", that the claim of the Petitioner Peter J. Carpenter was correct and valid and should be allowed in the sum of $10,587.15 as a general unsecured claim, and that judgment should be entered thereon in said constituent Cause No. 9704 in favor of said Petitioner and against Wabash Railway Company in said sum, and that such claim

was not entitled to any lien or to any priority over other general unsecured claims.

This Petitioner only recently learned that such report with reference to this claim had been filed by the Special [fol. 78] Master and, as hereinabove stated, he was given no notice of the time when and the place where the Special Master would settle such report or that Petitioner might appear and file exceptions thereto, and Petitioner was given no notice of the filing of such report, and no order has been made by the Special Master or by this Honorable Court relative to the time, place or manner for the filing by the Petitioner of such exceptions to said report as he may desire to file. According to Petitioner's information and belief, no order has been entered by this Honorable Court approving or affirming said report of said Special Master. And this Honorable Court is without right or authority to approve or confirm said report until this Petitioner shall have been afforded the right and reasonable notice and opportunity to file exceptions thereto, and until this Honorable Court shall by its order have fixed the time, place and manner for the filing by Petitioner of such exceptions as he may desire to file to said report. Petitioner for the reasons herein mentioned is entitled to except to such report but has not been able to do so for the reasons above mentioned. For the reasons herein mentioned, and upon, and for the reasons appearing in, the record in the above entitled consolidated cause and in the above entitled constituent cause In Equity No. 9704, said report to the effect that the claim of the Petitioner is a general unsecured claim and not entitled to any lien or priority, is, erroneous in law and fact.

XII.

Although no order has been made relative to the time, place or manner for the filing by Petitioner of exceptions to said report of the Special Master, nevertheless, the Petitioner at about the time that he first learned that [fol. 79] such report had been filed, did file Objections in the above entitled consolidated cause to the proposed plan of reorganization, filed herein, and in such objections did clearly set forth the nature of his claim and that he has a lien and is entitled to priority as in said Objections and

as herein set forth, and said Objections are by this reference thereto, hereby made a part hereof.

XIII.

The filing by Petitioner of his said claim as aforesaid operated to give notice to this Honorable Court and to the Receivers of Wabash Railway Company of Petitioner's judgment and his lien and rights thereunder as herein set forth. The lien and rights of Petitioner as herein set forth were and are within the judicial notice and knowledge of this Honorable Court, and in law and in equity appear upon the record in this consolidated cause, and the record in said constituent cause No. 9704.

XIV.

On December 1, 1931, the above named T. J. Moss Tie Company, as Complainant, instituted in this Court, the above entitled Constituent Cause No. 9704, In Equity, against Wabash Railway Company, as Defendant therein, by the filing of its Bill of Complaint, wherein it alleged in substance, among other things, that Wabash Railway Company was indebted to said Complainant on account of a general claim in the sum of $49,651.95, and that the liabilities of Wabash Railway Company exceeded the actual value of its assets by many millions of dollars. Said Complainant did not allege or claim any lien upon any of the property of Wabash Railway Company. Said Bill of Complaint prayed for the appointment of a Receiver for the property and railways of Wabash Railway Company and for orders incidental thereto.

[fol. 80] Upon the filing of such Bill of Complaint, Wabash Railway Company, by and through its General Solicitor, Nat. S. Brown, on said December 1, 1931, appeared and filed in said Constituent Cause its Answer wherein it admitted all the allegations in such Bill of Complaint contained and in substance joined in such application for the appointment of a Receiver.

Thereupon, this Honorable Court, by its order and judgment in said Constituent Cause, did, on said December 1, 1931, appoint Walter S. Franklin and Frank C. Nicodemus, Jr., then the President and Assistant General Counsel, respectively, of Wabash Railway Company, as

Receivers of all of the railways and property of Wabash Railway Company and further ordered that "all ..... persons ..... be and they are hereby restrained and enjoined from interfering with, attaching, levying upon, or in any manner whatsoever disturbing any portion of the property and premises of which Receivers are hereby appointed ....."

On December 3, 1931, said Nat S. Brown was by this Honorable Court appointed General Counsel for such receivers.

On October 19, 1933, said Walter S. Franklin resigned as such Receiver of Wabash Railway Company and thereupon Norman B. Pitcairn was, by this Honorable Court, appointed as a Receiver of Wabash Railway Company to fill the vacancy caused by such resignation.

XV.

By said judgment and order rendered by this Honorable Court on December 1, 1931, Petitioner has been prevented from collecting his said judgment or any part thereof, and from ordering or levying any execution and from enforcing the lien of said judgment upon the real property owned by Wabash Railway Company in St. Louis, Missouri, at and since the time said judgment was recovered and Petitioner has been prevented and restrained from taking any steps or instituting any proceedings to enforce the payment of said judgment. Moreover, except for said order of December 1, 1931, [fol. 81] the Petitioner would, under the applicable statutes of Missouri, have been entitled upon recording his said judgment in any and all counties in Missouri in which Wabash Railway Company owned or owns real property, to have thereby obtained a lien upon such real property and to have caused execution to be issued and levied upon any and all real property of Wabash Railway Company in such counties in Missouri.

The Receivers of Wabash Railway Company have since the time of said appointment on December 1, 1931, received considerable income and earnings from and on account of the real property of Wabash Railway Company located in the City of St. Louis, Missouri, and from and on account of the real property of Wabash Railway Com-

pany located in Missouri, elsewhere than the City of St. Louis.

XVI.

Between the time the said Receivers were appointed for Wabash Railway Company and April 19, 1937, the Receivers of Wabash Railway Company, pursuant to authority from this court, paid out as and for interest on first mortgage and other underlying bonds an aggregate sum of many millions of dollars, and such payments of interest were out of funds derived by the receivers as income from the possession and the operation by them of the property of Wabash Railway Company and which funds had never been impounded for the benefit of any particular party or parties and were not subject to the lien of any mortgage or mortgages. Prior to March 1, 1937, no petition, proceeding or proceedings were had or filed herein for or on behalf of any bondholder, bondholders, mortgage trustee or mortgage trustees, security or securities whatsoever for the segregation, sequestration and impounding of tolls, income, rents, issue and profits of, or from, the property of Wabash Railway Company in the possession [fol. 82] of said receivers, or any of the same, or for the foreclosure of any mortgage or deed of trust upon any of the property of Wabash Railway Company in the possession of said receivers, or any of the same, or for the foreclosure of any mortgage or deed of trust upon any of the property of Wabash Railway Company in the possession of the receivers, or any part of the same. The receivers now have in their possession, sums of money more than sufficient to pay the claim of Petitioner and others similarly situated, and which moneys were derived by the receivers as income and earnings from and by reason of the possession and operation by them as such receivers of the property of Wabash Railway Company and which are not subject to any lien of any bond, bonds, mortgage, mortgages, deed of trust or deeds of trust.

XVII.

Included in the property and assets of Wabash Railway Company at and for some years prior to the time re-

ceivers were appointed as aforesaid, were and are 357.46 miles of railway and other property in the State of Indiana and which according to Petitioner's belief and information were and are reasonably worth many millions of dollars and such lines of railway and property in the State of Indiana have been operated by the receivers since their appointment and from such operation the receivers have received large amounts of income and earnings. It is the law of the State of Indiana as declared by the Supreme Court of Indiana in the case of McCullough, et al. vs. Union Traction Company of Indiana, et al., 206 Indiana Reports 585, that in the operation of railroads, accidents and injuries to persons and property are unavoidable, and that the payment and settlement of such claims must necessarily be considered as operating expense and that [fol. 83] such claims have a preference and priority over mortgage creditors and that where the use and management of mortgaged property is left in the hands of a mortgagor, he acts, in a sense, as the agent of the mortgages.

XVIII.

In accordance with the authority vested in it by law, the Interstate Commerce Commission made and entered an order effective July 1, 1914, prescribing a classification of operating revenues and operating expenses for the use of carriers by rail, in the keeping of their operating revenues and operating expense accounts, and requiring such carriers to keep all operating revenues and operating expense accounts in conformity therewith. In and by said orders and classifications, it is provided that all damages and costs adjudged against such Railway Company in favor of employees for personal injuries are to be classified as operating expenses.

The claim of Petitioner is, and should be considered as, an operating expense.

XIX.

On March 1, 1937, the Chase National Bank of the City of New York, as trustee, filed in this court, its Bill of Complaint against Wabash Railway Company, et al., and on such date such action was consolidated with the above mentioned Constituent Cause In Equity, No. 9704, and the

receivership was extended as appears from the records in this consolidated Cause.

On November 1, 1937, Central Hanover Bank & Trust Company, as Trustee, filed its Bill of Complaint against Wabash Railway Company, et al., and on such date such action was consolidated with the above entitled Consolidated Cause and the receivership was extended as appears from the records in this Consolidated Cause.

[fol. 84] XX.

Since the time receivers were appointed for Wabash Railway Company on December 1, 1931, as aforesaid, there have been herein practically no proceedings of a constructive nature and looking towards a final disposition of said constituent and consolidated causes, and of the termination of said receivership. The only practical result thus far, with reference to said receivership, is that for a period of more than six years, this Honorable Court has, by and through such receivers, been in charge and control of and operating the Wabash Railway Company and out of the earnings and income thereby received, interest has been paid on first mortgage and other underlying bonds, and betterments of the property have been had, and by such continued possession and operation by the Court of the property of Wabash Railway Company and by the continuance of its said restraining order of December 1, 1931, the Petitioner has been prevented from collecting his said judgment.

XXI.

That this Honorable Court has itself recognized that the receivership herein has been unduly prolonged is evidenced by the fact that by its order herein on April 19, 1937, the Court commented that this receivership had existed for almost five and a half years and that throughout that period the Court had from time to time authorized the receivers to pay interest on said bonds and the Court did deny a petition in said order mentioned for authority to pay interest on the Wabash Railway Company First Mortgage Bonds, and did order that until the further order of the court no further payments of interest on any bonds should be made by the receivers, and did further order

that the security holders of Wabash Railway Company should formulate and file herein, within sixty days from the date of said order "a plan of reorganization of the defendant Railway Company to the end that at the earliest [fol. 85] practicable date the administration of the property and assets of said defendant be withdrawn from this Court and restored to the management and operation of the owners." Since then the court has, however, authorized further payments of interest on bonds of Wabash Railway Company.

That the unusual and prolonged term of this receivership and the aforesaid inactivity of the parties hereto and the said security holders, made it reasonable to assume that the security holders would probably not comply with such order that a plan be filed within sixty days from April 19, 1937, was apparently recognized by a further portion of said order to the effect that in the event of the failure of the security holders to formulate and file a plan of reorganization within the time specified, "then the receivers shall, within thirty (30) days after the expiration of the time fixed in said paragraph 4, formulate and file herein a plan of reorganization .....".

Such assumption has been proven to have been well grounded, for, as appears from the files and records herein, the security holders did not comply with the said order of April 19, 1937, and have not filed any Plan of Reorganization, but the receivers did on or about July 14, 1937, submit a Plan, but said Plan as filed by the receivers, is only in skeleton or chart form and in general is vague and indefinite and can hardly be considered as a Plan of Reorganization, within the ordinary meaning of that term as applied to and used in railroad reorganization proceedings.

No proceedings for the valuation of the property and assets of Wabash Railway Company have been had and the only indication relative to the value thereof are the allegations in said Bill of Complaint T. J. Moss Tie Company, to the effect that the liabilities of Wabash Railway Company exceed by many millions of dollars the actual value of its assets, and the actual value of its assets, [fol. 86] and the admission in said answer of Wabash

Railway Company to the effect that the allegations in said Bill of Complaint are true. Notwithstanding the same, however, said Plan, while not providing for payment in full of this Petitioner's claim and of the claims of others similarly situated, does provide that the present stockholders of Wabash Railway Company shall receive stock to the amount, and as provided, in said Plan.

XXII.

Since the commencement of the receivership herein, there has been enacted Section 77 of the National Bankruptcy Act, providing for the reorganization of railroads engaged in interstate commerce. Said Section 77 provides, among other things, that in proceedings thereunder for the reorganization of railroads engaged in interstate commerce, claims for personal injuries to employees of a railroad corporation shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad.

Said Section 77 also provides that where a trustee is appointed, who within one year prior thereto has been an officer, director or employee of the debtor corporation, any subsidiary corporation, or any holding company connected therewith, the Judge, subject to ratification by the Interstate Commerce Commission, shall appoint another trustee or trustees, who shall not have had any such affiliation. Said Section 77 also provides that the Judge shall direct the trustee or trustees, and may request the Interstate Commerce Commission, through such of its agencies, as it may designate, to report to him any facts pertaining to irregularities, fraud, misconduct, or mismanagement, as a consequence of which the debtor railroad company may have a cause of action arising therefrom against any person or corporation.

[fol. 87] As stated and recognized by the Supreme Court of the United States in the case of Continental Ill. N. B. & T. Co. vs. Chicago, Rock Island and Pac. Ry. Co., et al., 294 U. S. 648:

"Equity receiverships resorted to for that purpose, (i. e., reorganization of railroads) have never been satisfactory for many reasons. Partly, no doubt, in recognition of

that situation, Congress by paragraph 77, added railroad corporations to the category of those who might have relief by legislation passed in virtue of the bankruptcy clause of the Constitution . . . . . "

A report of the Legislative Committee of the Interstate Commerce Commission was sent to United States Senator Hastings on January 31, 1933, in connection with the study then being conducted by a Senate Committee on proposed legislation relative to Railroad reorganizations. As is stated in such report: "Railroad receiverships and the reorganizations which follow them have been severely criticized . . . . . Conduct of a railroad receivership is a tremendous burden upon a Judge. He has many other duties to perform which engross his attention, and as a rule he has no particular acquaintance with railroad affairs or with their financial, operating and management problem . . . . . Present procedure with respect to railroad receiverships and reorganizations is most unsatisfactory and inconsistent with the public interest, because of:

1. The extravagant and exorbitant expense.

2. The general inability of courts to exercise proper supervision over the proceedings, due to the demands of their other work and their unfamiliarity with railroad affairs. This point was developed by the late Chief Justice Taft as long ago as 1895 in an article which appears in the reports of the American Bar Association, Vol. 18 (1895). An excerpt is attached as an appendix hereto.

[fol. 88] 3. The fact that both the management of the property during receivership and the formulation of the reorganization plan are likely to be dominated by the old company and its bankers, notwithstanding that it was under this regime that the company became entangled in financial difficulties.

4. The fact that the reorganization managers are thus likely to have a closer relation to the stockholders of the old company than to its creditors, and that the widely-scattered creditors have an inadequate opportunity to protect their legitimate interests.

5. The fact that the Commission, which has the final duty under the interstate commerce act [or] protecting the

general public interest with respect to the issuance of railroad securities, is required to exercise this duty under most embarrassing and difficult circumstances, after every other step has been taken and when it must either approve or undo everything which has been done.

As is further stated, in substance, in said report, the Interstate Commerce Commission has been entrusted by Congress with final responsibility for the protection of public interest with respect to the issue of railroad securities and the very essence of railroad organizations is the issuing of new securities, and because of such jurisdiction and its other duties, the Commission is better acquainted with railroad affairs and has more complete information with reference thereto than any court or any other public body possesses, and it also has the assistance of a staff of accounting and financial experts. Also, as pointed out in such report, the powers of the Interstate Commerce Commission under a reorganization, through a receivership of a railroad company, are limited in so far as a plan of reorganization is concerned, for its authority does not extend with reference to the formulation of the plan and its authority is not sought until every other step has been taken, and its authority is therefore limited to an approval or upsetting of the entire plan. Said Section 77 seeks to remedy many of the defects and complaints relative to equity receiverships of railroads and reorganizations thereunder. As appears from said Section 77, considerable powers and supervision have been vested in the Interstate Commerce Commission.

[fol. 89]

## XXIII.

The Pennsylvania Railroad Company acquired stock and the effective control of Wabash Railway Company in about the year 1927, as hereinabove stated, without the authority of, or consent from, the Interstate Commerce Commission, and for a long time concealed its ownership of such stock, from the Interstate Commerce Commission, all as is more fully set forth in the report of the Interstate Commerce Commission in an action instituted by such Commission against Pennsylvania Railroad Company et al., and which report is contained in Volume 169 of Interstate Commerce Commission Reports, page 618, and

such report is by this reference thereto hereby made a part hereof. In such report said Commission did hold that the acquisition by Pennsylvania Railroad Company of such stock was in violation of Section VII of the Clayton Act, and directed that the Pennsylvania Railroad Company and its subsidiary the Pennsylvania Company divest themselves of such stocks.

The U. S. Circuit Court of Appeals for the Third Circuit having reversed such decision of the Interstate Commerce Commission (66 Fed. 2d 37) in an opinion pointing out that the Court was not primarily concerned with the economic result of its interpretation of the statute under which the action had been brought, and that the same was a matter for Congress, such opinion of said Appellate Court was upon a Certiorari proceeding affirmed by the Supreme Court of the United States as a result of the Supreme Court being equally divided, Mr. Justice Roberts taking no part in the consideration or decision of the case.

Petitioner is informed and believes, and therefore states that the Pennsylvania Railroad Company since acquiring control of Wabash Railway Company as aforesaid has so [fol. 90] improperly exercised such control, that the Wabash Railway Company has suffered great losses and wasting of its assets, and that Pennsylvania Railroad Company has so exercised its control over Wabash Railway Company as to hinder the Wabash Railway Company in the obtaining of business in competition with the Pennsylvania Railroad Company and its affiliates, and thereby the Wabash Railway Company has sustained great losses.

## XXIV.

As reported in Moody's Manual of Investments (Steam Railroads) 1937, an authority on reports relative to the financial structure and practices of corporations:—

"During the several years ended in 1930 there was an almost uninterrupted increase in Wabash Railway's funded report from about $80,000,000. at the end of 1924 to $140,000,000. at the end of 1930. There was a further increase in more recent years with debt outstanding at the end of 1936 of about $155,000,000. or almost twice that out-

standing a little more than a decade earlier. Much of the funds obtained from the sale of the Junior Refunding and General Management Bonds was used for improvement of the property. However, a fair assumption is that not as many bonds would have been sold as were sold had the Company not been purchasing the stocks of other railroads, including Ann Arbor Railroad, Lehigh Valley Railroad and Wheeling & Lake Erie Railway. In this connection, it may be well to point out that the price paid for the stocks of the first two roads were extremely high."

No investigation or inquiry whatsoever has been made or ordered herein with reference to the manner in which the Pennsylvania Railroad Company exercised its control over Wabash Railway Company as aforesaid, or with reference to the losses sustained through the improper exercise of such control by the Pennsylvania Railroad Company, and no action has been taken by the receivers of Wabash Railway Company relative thereto.

[fol. 91] XXV.

The appointment of receivers of a railroad company upon pleadings, such as those upon which the appointment of receivers was made in this case, have been consented to by courts, primarily upon the theory that the same was necessary for the protection of the public interest and welfare, and because there was no other procedure through which the reorganization of a railroad company and the protection of its creditors might be had, without interruption of its business and resulting detriment to the Public. However, since the appointment of receivers herein, there has been enacted as aforesaid Section 77 of the National Bankruptcy Act, providing a comprehensive method for the reorganization of a financially embarrassed or insolvent railroad corporation, and the continuation by this Honorable Court of this receivership herein would be in conflict with the intent of the Congress and President of the United States relative to said Section 77 and would operate to deprive Petitioner and all other parties in interest and the public generally, of the rights, benefits, advantages and safeguards provided and intended by said Section 77.

Moreover, as appears from the record herein, the present receivership of Wabash Railway Company is what is commonly termed and known as a "friendly" receivership, brought about by Wabash Railway Company as aforesaid, and Wabash Railway Company is now, and since the enaction of said Section 77 of the National Bankruptcy Act has been, able to obtain a plain, adequate and complete remedy at law by availing itself of the provisions of said Section 77, and the holders of its bonds are also able to obtain a plain, adequate and complete remedy at law by availing themselves of the provisions of said Section 77 of the National Bankruptcy Act.

[fol. 92] Thus far no proceedings have been had herein to ascertain any facts pertaining to irregularities, fraud, misconduct or mismanagement of Wabash Railway Company, as a consequence of which it may have a cause of action arising therefrom against any person or corporation and it is obvious for the reasons hereinabove set out that the receivers are not the proper parties to institute or maintain proceedings to ascertain any such facts and to take any action relative thereto. Furthermore, the situation with reference to Wabash Railway Company and the receivership as herein mentioned clearly show that for the protection of Wabash Railway Company, the Petitioner and all other parties in interest, it is necessary that any reorganization of Wabash Railway Company, be by and through a proceeding under said Section 77, so that the relief, remedies, guards and protection therein provided for a Railway Company, its creditors, and all parties in interest, and the public generally may be available. The right of Petitioner to have his said judgment paid to him immediately as provided by said Section 77 is a right guaranteed unto him by a law of the land, and in equity and law, is not to be impaired on account of the nature of the proceeding in which a reorganization of Railway Company is sought. Furthermore, under the rule and principle that equity follows the law, the Petitioner is entitled to have said judgment paid unto him immediately and as provided by said Section 77. The continued restraint by this Honorable Court of the Petitioner's right to immediately collect and be paid the full amount due him on account of his said judgment, whether such restraint be by virtue of

said restraining order or by the receivership, is contrary to the spirit and intent of the provision made in Section 77, as aforesaid, for the protection and immediate payment of claims for personal injuries to employees of a railroad corporation. Moreover, it is a well accepted rule and principle of law and equity that whenever the reason or necessity for a receivership ceases to exist, the property [fol. 93] should be discharged therefrom and the receivership should be terminated. The enactment of said Section 77 of the National Bankruptcy Act has removed whatever reason or necessity, there may have been, for a receivership of Wabash Railway Company.

As hereinabove set forth, Petitioner claims and has a lien upon all of the real property of Railway Company, lying, located, being and situate in the City of St. Louis, Missouri, as well as other rights and liens as hereinabove set forth and this Court is exercising jurisdiction, as herein mentioned, over all of the property of Railway Company upon which Petitioner has and claims a lien and in which he has rights as hereinabove set forth, and Petitioner is advised and believes that his interests in such property can be established, preserved and enforced in no other way than by the determination and action of this Honorable Court as herein prayed for.

XXVI.

Said Wabash Railway Company is a corporation, organized and existing under the laws of the State of Indiana, and its lines of railways are located in the States of Missouri, Iowa, Illinois, Indiana, Michigan and Ohio. The number of miles of railways owned by it in the said States is as follows:

| Name of State. | Number of Miles. |
|---|---|
| Missouri | 652.35 |
| Iowa | 208.96 |
| Illinois | 742.81 |
| Indiana | 357.46 |
| Michigan | 105.60 |
| Ohio | 170.22 |

Petitioner files this petition and brings and prosecutes this proceeding for, and on behalf of himself and all others

similarly situated and all creditors of Wabash Railway Company whose claims are for personal injuries to employees of said Company, and for the protection of the estate of Wabash Railway Company.

[fol. 94] Wherefore, And Forasmuch As, Petitioner is without other or adequate remedy at law or in any other proceeding, this Petitioner respectfully prays:

(1) That the said Norman B. Pitcairn and Frank C. Nicodemus, Jr., and each and both of them, be discharged as receivers of Wabash Railway Company.

(2) That the receivership of Wabash Railway Company as ordered in the above entitled Consolidated Cause and Constituent Causes be, by the order of this Honorable Court, terminated, and that the property of Wabash Railway Company be discharged from said receivership.

(3) That the Restraining Order made and entered by this Honorable Court on December 1, 1931, as aforesaid, and ordering that all persons be restrained and enjoined from interfering with, attaching, levying upon, or in any manner whatsoever, disturbing any portion of the property and premises of Wabash Railway Company, for which said receivers were appointed, be dissolved.

(4) That the Court, if it shall deem the same proper and best, afford unto Railway Company and its security holders the opportunity for a reasonable time not to exceed thirty (30) days, within which to institute proceedings under Section 77 of the National Bankruptcy Act for the reorganization of Wabash Railway Company, before making an order terminating the receivership and discharging the property of Wabash Railway Company therefrom, effective.

HYMAN G. STEIN,
MARK D. EAGLETON,
(by H. G. S.)
Attorneys for Petitioner.

[fol. 95] State of Missouri,
City of St. Louis—ss.

Mark D. Eagleton, being duly sworn on his oath states that he is agent and attorney for the above named Petitioner, Peter J. Carpenter, and that he has read the fore-

going petition, and that the same is true according to the best of his knowledge, information and belief, except as to the matters therein stated to be alleged upon information and belief, and as to these matters he believes them to be true.

MARK D. EAGLETON.

Subscribed and sworn to before me this 24 day of January, 1938.

F. R. BARRETT,
Notary Public.

(Seal)

My commission expires Sept. 5, 1939.

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[fol. 96] (Order of Submission of Petition for Order Terminating Receivership of Wabash Railway Company, etc.)

Before Judge Davis—Court No. 1.

April 4, 1938.

Now by consent of parties, the application of Peter J. Carpenter for leave to file petition for order terminating receivership of Wabash Railway Company and dissolving temporary restraining order and injunction submitted to the Court, and the petitioner is granted ten days within which to file supporting brief and defendant ten days thereafter within which to file reply brief.

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[fol. 97] (Record Entry of Filing of Notice of Appeal and of Mailing of Copies to Counsel for Appellees.)

Sept. 30, 1938.

Notice of appeal to U. S. C. C. A. of Peter J. Carpenter from order entered August 31, 1938, denying his petition for order terminating receivership of Wabash Ry. Co., and dissolving temporary restraining order and injunction, filed. Copies of such notice mailed to Messrs. Williams, Nelson & English, Attorneys for T. J. Moss Tie Company, Mr. Homer Hall, Attorney for Wabash Ry. Co.; Mr. Nat S. Brown, Counsel for receivers, Frank C. Nicodemus, et al.; Messrs. Nagel, Kirby, Orrick & Shepley, Attorneys for

Chase National Bank, as Trustee, etc., Messrs. Fordyce, White, Mayne, Williams & Hartman, Attorneys for Central Hanover Bank & Trust Co., as Trustee.

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[fol. 98] (Findings of Fact and Conclusions of Law of District Court.)

(Filed August 31, 1938.)

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

The Chase National Bank of the City of New York, as Trustee, Plaintiff,

No. 12099. vs. In Equity.

Wabash Railway Company, et al., Defendants.

Consolidated Cause.

In the Matter of the Petition of Peter J. Carpenter for leave to file an intervening petition.

This cause coming on to be heard on the petition of Peter J. Carpenter for leave to file an intervening petition herein, a copy of which is annexed to said petition for leave, and the Court having heard the arguments of counsel, and being fully advised, now makes the following findings of fact and conclusions of law:

Findings of Fact.

1. On February 15, 1929, the petitioner, Peter J. Carpenter, while in the employ of the defendant Wabash Railway Company sustained personal injuries. Thereafter petitioner filed a suit against the defendant Railway Company in the Circuit Court of the City of St. Louis for the recovery of damages alleged to have been sustained as a result of said injuries, and recovered a judgment in said court against the Railway Company in the amount of $15,000 and costs. Thereafter the Railway Company appealed from said judgment to the Supreme Court of the State of Missouri, where the judgment was affirmed upon condition that Carpenter enter a remittitur in the sum of $5,000; and, thereafter, pursuant to the mandate of the Supreme Court of Missouri issued in said cause the Circuit Court of the City of St. Louis, on July 6, 1934, entered an

order that the verdict and judgment theretofore rendered in said cause in favor of said Carpenter and against said Railway Company for the sum of $15,000 be set aside and vacated and for naught held, and that a new judgment be rendered in favor of said Carpenter and against said Railway Company, as of February 13, 1931, in the sum of $10,000; and said Circuit Court on said 6th day of July, 1934, adjudged that said Carpenter have and recover from said Railway Company the sum of $10,000 with interest thereon at the rate of 6% per annum from February 13, 1931, until paid, together with costs of the suit wherein said judgment was rendered.

[fol. 99] 2. On December 1, 1931, the T. J. Moss Tie Company, a Missouri corporation, filed its bill of complaint in this court against Wabash Railway Company, an Indiana corporation, in which it alleged that the plaintiff was a general unsecured creditor of said Railway Company; that said Railway Company was insolvent, that its railway lines and other properties were heavily mortgaged, that said Railway Company was unable to pay its debts, and prayed the appointment of receivers of all the railway lines and properties of said Railway Company. The Railway Company filed its answer to said bill of complaint in which it admitted the allegations of said bill and consented to the appointment of receivers. Thereupon, on said December 1, 1931, an order was entered in said cause in Equity No. 9704, appointing receivers of all the lines of railway and other properties of the defendant Railway Company. The order appointing receivers, among other things, contained the usual and customary injunctive provisions contained in such orders, as follows:

"8. That Wabash Railway Company and the officers, directors, agents, attorneys and employees of said Railway Company, and all other persons claiming to act by virtue of or under said Railway Company, and all other persons, firms and corporations whatsoever and wheresoever situated, located or domiciled, be and they are hereby restrained and enjoined from interfering with, attaching, levying upon or in any manner whatsoever disturbing any portion of the property and premises of which receivers are hereby appointed, or from taking possession of, or in

any way interfering with, the same or any part thereof, or from interfering in any manner to prevent the discharge by said receivers of their duties or the operation of said property and premises under the orders of this Court."

3. On March 1, 1937, The Chase National Bank of the City of New York, as Trustee under the Refunding and General Mortgage of Wabash Railway Company dated January 1, 1925, filed its bill of complaint in this court, by leave, for the foreclosure of the lien of said mortgage, and prayed the appointment of receivers, and the impounding of the income from the mortgaged property. The bill alleged that $60,867,000., principal amount of bonds have been issued under said mortgage. To said bill of complaint the defendant Railway Company filed its answer admitting, in general, the allegations of the bill and consented to the appointment of receivers. Thereupon an order was entered appointing as receivers the same persons who had theretofore been appointed in the T. J. Moss Tie Company case, and consolidating the two causes under the caption of The Chase National Bank of the City of New York, Trustee of the Refunding and General Mortgage of Wabash Railway Company, dated January 1, 1925, vs. Wabash Railway Company, et al., Consolidated Cause in Equity No. 12099.

[fol. 100] 4. On November 1, 1937, the Central Hanover Bank and Trust Company of New York, N. Y., as Trustee under the First Mortgage of the Wabash Railroad Company, dated May 1, 1889, filed its bill of complaint in this court, by leave, against the Wabash Railway Company, et al., alleging that bonds in the principal amount of $33,891,000. have been issued under said Mortgage, that the Railway Company has defaulted in the payment of interest on said bonds, and prayed for the appointment of receivers of the properties covered by said instrument, and the impounding of the rents, issues and profits from the mortgaged properties, and for other relief. The Railway Company filed its answer to said bill of complaint generally admitting the allegations thereof and consented to the appointment of receivers. Thereafter an order was entered appointing as receivers the same persons who had

theretofore been appointed under the causes described in the next two preceding paragraphs, and a further order was entered on November 4, 1937, impounding for the benefit of said mortgage the rents, issues and profits derived from the properties covered thereby.

5. On May 4, 1938, the Central Hanover Bank and Trust Company of New York, as Trustee under the said First Mortgage of The Wabash Railroad Company, filed its amended and supplemental bill of complaint in this court, by leave, wherein the said Trustee, among other relief prayed for, prayed for the foreclosure of the lien of said mortgage; and upon said amended and supplemental bill this Court on said May 4, 1938, entered an order in this cause that the orders entered in said cause upon said original bill of complaint on November 1, 1937, and November 4, 1937, be deemed to have been entered upon said amended and supplemental bill of complaint.

6. Under orders entered in the causes above described all of the railway lines and other properties of the defendant Wabash Railway Company have been in the custody and control of the receivers appointed by this Court, and by orders of other district courts exercising ancillary jurisdiction, since December 1, 1931, and said orders of appointment are still in force and effect.

7. On January 26, 1938, the petitioner, Peter J. Carpenter, filed herein his petition for leave to file an intervening petition in this consolidated cause alleging, among other things, that he is a judgment creditor of the defendant Railway Company for the sum of $10,000., with interest and costs; that said judgment remains unpaid and prays leave to file his intervening petition for an order dismissing and terminating the several receivership proceedings above described, and for dissolution, as to him, [fol. 101] of the above mentioned injunctive orders contained in the several orders of this Court appointing the receivers in the constituent causes of said consolidated cause.

8. The record in this consolidated cause shows that prior to July 1, 1932, the petitioner, Peter J. Carpenter,

filed with the Special Master appointed by this Court to hear and report upon claims filed against the defendant Railway Company, his claim upon the aforesaid judgment in the amount of $10,000, together with interest and costs, for allowance and proper classification of said claim; that on March 7, 1936, the said Special Master filed his report upon said claim of petitioner in which he reported to the Court that said claim, in the amount of $10,587.15, is correct and valid and should be allowed for said sum as a general unsecured claim, and that judgment should be entered thereon in this cause in favor of said claimant, and against the defendant Railway Company, and that said claim is not entitled to any lien or to any priority over other unsecured claims. No exception was taken or filed to the said report of the Special Master by said petitioner or by the defendant Railway Company, the receivers, or any other person, and the time has long since past for filing exceptions to said report.

9. The order of the Court entered in this cause appointing the Special Master and directing him to hear and report upon the claims filed in this proceeding against the defendant Railway Company provided that as to any contested claim the Special Master should, before finally settling his report thereon, furnish to the claimant and to the defendant Railway Company, its receivers, and other interested parties a copy of his proposed report and that any of said parties desiring to except to all or any part of the Master's proposed report should file with the Special Master their exceptions to the proposed report, and the Special Master would thereupon notify the parties of the date upon which he would hear said exceptions and to settle his report. No provision was made in said order appointing the Special Master for the filing of exceptions to claims the validity of which were uncontested by the defendant, its receivers, or any other party in interest. In the claim filed by said Peter J. Carpenter with the Special Master, the Master in his report upon said claim, among other things, stated:

"A certified copy of the judgment of said Circuit Court rendered July 6, 1934 was filed with this Special Master. Counsel appearing on behalf of Wabash Railway Company and on behalf of the Receivers of said last mentioned

Company did before this Special Master agree that the claim of said Claimant be allowed as set out in said judgment of July 6, 1934."

[fol. 102] Conclusions of Law.

The petition of Peter J. Carpenter for leave to file his petition for an order terminating the receivership proceedings above mentioned, and for a dissolution as to him, of the above mentioned injunctive orders contained in the several orders appointing the receivers in the constituent causes of said consolidated cause should be denied for the following reasons:

(a) The petition which said petitioner seeks leave to file does not conform to the requirements of Equity Rule No. 37;

(b) The status and classification of petitioner's claim as an unsecured claim which is not entitled to any lien or priority of payment over any other unsecured claim has heretofore been correctly and finally determined in this cause, and said petitioner is now estopped from asserting a claim for preference and priority of payment over the many other unsecured creditors whose claims have been filed and allowed in these proceedings;

(c) The intervening petition which petitioner seeks leave to file states no cause of action in equity, and the granting of leave to file will merely serve to encumber and delay the orderly process of these cases toward a reorganization of the properties of the defendant Railway Company;

(d) The dismissal, as to said petitioner, of the injunctive provisions of the several orders of this Court appointing the receivers in the several constituent causes of this consolidated cause, without a dismissal of the said several causes, would be of no aid or benefit to said petitioner, since all of the properties of the defendant Railway Company would remain in the exclusive custody and control of the Court's receivers.

CHARLES B. DAVIS,
District Judge.

Dated: August 31, 1938.

[fol. 103] Decree.

(Filed Aug. 31, 1938.)

In the District Court of the United States For the Eastern Division of the Eastern District of Missouri.

The Chase National Bank of the City of New York, as Trustee, Plaintiff,

No. 12099. vs. In Equity.

Wabash Railway Company, et al., Defendants.

Consolidated Cause.

In the Matter of

The Petition of Peter J. Carpenter for leave to file an Intervening Petition.

This cause came on to be heard at this term and, thereupon, upon consideration thereof it was Ordered, Adjudged, and Decreed:

That the petition of Peter J. Carpenter for leave to file his intervening petition in this cause, in form annexed to said petition for leave, be and the same hereby is denied.

The Court's findings of fact and conclusions of law are filed herewith.

CHARLES B. DAVIS,
District Judge.

Dated: August 31, 1938.

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[fol. 104] (Order Granting Peter J. Carpenter Leave to Deposit money with Clerk of District Court in lieu of Bond on Appeal.)

(Filed September 30, 1938.)

In the District Court of the United States For the Eastern Division of the Eastern Judicial District of Missouri.

Chase National Bank of the City of New York, as Trustee, Plaintiff,

No. 12,099. vs. In Equity.

Wabash Railway Company, et al., Defendants.

Consolidated Cause.

Peter J. Carpenter now tendering for deposit with the Clerk of this Court the sum of Two Hundred Fifty Dollars ($250.00) as a Cash Bond on the Appeal now, on this 30th day of September, 1938, taken by said Peter J. Car-

penter to the United States Circuit Court of Appeals for the Eighth Circuit, as stated in his Notice of Appeal now, on this day, filed by him in the above entitled cause, from the orders, judgment and decree made and entered in the above entitled Consolidated Cause on August 31st, 1938, upon, and in connection with, his Application for leave to file in the above entitled Consolidated Cause, his Petition, presented with, and attached to, said Application, and upon, and in connection with, his claim and judgment in said Application and Petition mentioned and described;

Now, Therefore, it is, by the Court, Ordered:

(1) That said Peter J. Carpenter be, and he is hereby, granted leave to deposit the said sum of Two Hundred Fifty Dollars ($250.00) with the Clerk of this Court, as a Cash Bond on his said Appeal, and that his said Cash Bond on Appeal be, and the same is hereby, approved;

[fol. 105] (2) That the condition of the said Bond is that if said Appellant shall prosecute his said Appeal with effect and without delay and answer to all damages and costs, if said orders, judgment and decree be affirmed, and to such costs as the Appellate Court may award if the judgment is modified, then the said obligation to be void; otherwise to remain in full force and effect.

Done this 30th day of September, 1938.

CHARLES B. DAVIS,
United States District Court Judge.

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[fol. 106]. Statement of Peter J. Carpenter (Appellant) of the Points On Which He Intends to Rely On His Appeal.

(Filed Oct. 1, 1938.)

In the District Court of the United States For the Eastern Division of the Eastern Judicial District of Missouri.

The Chase National Bank of the City of New York, as Trustee, Plaintiff,

No. 12,099. vs. In Equity.

Wabash Railway Company, et al., Defendants.

Consolidated Cause.

Comes now Peter J. Carpenter, (hereinafter referred to as Appellant), and states that the following are the points

on which he intends to rely on his appeal to the United States Circuit Court of Appeals for the Eighth Circuit, from the orders, rulings, judgment and decree made and entered in the above entitled Consolidated Cause, by the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, on August 31st, 1938, upon and in connection with his Application For Leave to File in the above entitled Consolidated Cause his Petition, presented with, and attached to said Application, and upon and in connection with his claim and judgment against Wabash Railway Company, mentioned and described in his said Application and Petition:—

The said District Court erred in denying Appellant's Application for leave to file his Petition for an order terminating the Receivership of Wabash Railway Company, [fol. 107] discharging the Receivers and dissolving the Temporary Injunction granted December 1, 1931, whereby Appellant has since that date been restrained and enjoined from levying execution on, and collecting, his judgment recovered February 13, 1931 against Wabash Railway Company. Appellant having been so enjoined and restrained had and has the absolute right to file and be heard upon a petition to dissolve said injunction. By said injunction the Court in effect made Appellant a party in the proceeding and Appellant was in effect given the status of a defendant who is summoned by process of Court. Any application made at any time to dissolve an existing injunctive order should be heard and if the facts warrant, it should be dissolved. Any creditor is entitled at any time to move the discharge of a receiver and the termination of the receivership and to present the question upon the situation existing at the time the motion is filed. The Court was and is without authority or right, and it is contrary to law and equity to unnecessarily, and for an undue time, prolong the Receivership, and after more than six years to continue by such receivership and injunction to keep at bay Appellant and other creditors of Wabash Railway Company similarly situated. In continuing the receivership and injunction for more than six years the Court has abused its powers and discretion and particularly so in view of the facts and circumstances appearing in the record and recited in the Petition Appellant sought leave to

file. Any creditor is entitled to be heard upon a Petition to remove receivers because of their unfitness and Appellant's Petition clearly reveals that the present receivers of Wabash Railway Company are eminently unfit and [fol. 108] should be removed.

Where, as in this case, an equity receivership proceeding is not being prosecuted in good faith, and is being used to hinder or delay creditors, it should be dismissed.

Irrespective of the right of the Court to make the original appointment of receivers of Wabash Railway Company, the subsequent enactment of the provisions in the National Bankruptcy Act for the reorganization of railroads engaged in Interstate Commerce provided a plain, adequate and complete statutory remedy for those who procured the appointment of receivers and for the reorganization of the Company, and therefore the present Equity Proceeding should be sustained no longer and a continuation of such Equity Proceeding and Receivership is contrary to Section 384, Title 28, U. S. C. A.

The Court having undoubtedly been unaware at the time the receivers were appointed, of the frauds practiced upon Wabash Railway Company as subsequently made public by a Committee of the United States Senate and as outlined in Appellant's Petition, should not, upon being informed thereof, have failed, hesitated or refused to terminate the Receivership and thereby compel the institution of a Reorganization Proceeding under the highly remedial provisions of the Bankruptcy Act relating to the reorganization of railroads.

In view of the facts and circumstances as recited in Appellant's Petition and the frauds perpetrated upon Wabash Railway Company, by interests now controlling its voting stock and which interests are dominant factors in formulating a proposed reorganization, and in view of the receivers' close connection with, and subordination to, such interests, the long pendency of the Receivership Proceedings and the submission of a proposed plan of reorganization affords no [fol. 109] justification for the further continuation of a proceeding under which the rights of Wabash Railway Company and its Creditors have not received, and are not re-

ceiving the protection intended and provided by such provisions of the National Bankruptcy Act and there can be no orderly or fair reorganization of Wabash Railway Company while the frauds alleged in Appellant's Petition are permitted to go without redress, and there can be no orderly or fair reorganization in a friendly receivership proceeding in which, as in the present receivership proceeding of Wabash Railway Company, there are present the abuses recited in Appellant's Petition and which abuses are of the character which the United States Appellate Courts have time and again criticized and which Congress, by provisions in the Bankruptcy Act relating to the reorganization of railroad companies, has sought to remedy or remove.

The continuation in office of one receiver of Wabash Railway Company, who has long been an officer thereof and of the other receiver who has himself long been an officer and major representative of Pennsylvania Railroad Company, holder of the voting control of Wabash Railway Company's stock, and which in Appellant's Verified Petition is alleged to have perpetrated upon Wabash Railway Company serious frauds and damage aggregating millions of dollars, operates to defeat the spirit and intention, and effect of the highly remedial proceedings and requirements provided by Congress in its Amendment of the Bankruptcy Act as a guard against the abuses in friendly equity receiverships of railroads.

The parties who petitioned for, and seek to continue the Receivership cannot have, under any circumstances, an absolute right to a continuation of such receivership, and even [fol. 110] when the continuation of a receivership is proper, the same rests within the discretion of the Court; a Court of Equity should not exercise any discretion it might have, to continue a receivership under the circumstances set forth in the Appellant's Petition, and when the continuation thereof operates to defeat the spirit and intention of remedial legislation enacted by Congress during the pendency of the Receivership and which receivership has deprived and continues to deprive Wabash Railway Company and its Creditors of the benefits and protection of such new legislation.

Independent of all questions relative to the classification or priority of Appellant's claim and judgment, the Court's own position as an institution of justice forbids that by a continuation of the Receivership of Wabash Railway Company and the continuation in office of the present receivers, that there should continue to be made unavailing the adequate and highly remedial proceedings provided in the Bankruptcy Act relating to the Reorganization of Railroads and through which proceedings there could be facilitated the protection of the rights of Wabash Railway Company and its creditors and the recovery on behalf of Wabash Railway Company and its creditors of millions of dollars lost to such Company through frauds and misconduct recited in Appellant's Petition, and which were practiced upon said Company by those formerly in control of the Company and who still control its voting stock and have close connections with the receivers and are dominant factors in current proceedings for the reorganization of Wabash Railway Company under the Plan as recited in Appellant's Petition, and under which Plan such frauds and losses would go unredressed and be forgiven.

By its orders, findings, conclusions and judgment the Court, upon a hearing of Appellant's said Application, [fol. 141] in effect and erroneously, refused an Order to wind up the pending Receivership of Wabash Railway Company, or to take the appropriate steps to accomplish the purposes thereof, and, in effect and erroneously, continued said Temporary Injunction granted December 1, 1931, and, in effect and erroneously, refused Appellant's Application to dissolve said Injunction.

The Court erroneously treated and considered Appellant's said Application and Petition as an Application for leave to file an Intervening Petition. Appellant's Application was for leave to file a petition for relief against the present proceeding and the Orders made therein, rather than for relief within such proceeding. The Court erred in holding that the Petition which Appellant sought leave to file does not conform to the requirements of former Equity Rule No. 37; furthermore, former Equity Rule No. 37 in no way applies, or is material to Appellant's said Application or Petition and is no longer in effect.

Even though such Application and Petition should be construed as an Application for leave to file an Intervening Petition, nevertheless such Petition on its face shows that it was within that class which Appellant had an absolute right to file and which the Court had no right or jurisdiction to deny, because of the allegations therein contained and because Appellant has an interest in and a lien upon specific property in the exclusive jurisdiction and subject to the exclusive disposition of said District Court, and his interest therein and lien thereon can be established, preserved or enforced in no other way than by the determination and action of that Court.

[fol. 112] In ruling upon Appellant's said Application, the Court was without right or authority to make any finding or ruling upon the status or classification of Appellant's claim and judgment against Wabash Railway Company, and the Court erred in doing so, and the court erred in making any ruling or finding or entering any judgment upon Appellant's said claim or judgment or the status or classification thereof, while and although refusing to accord Appellant any right of trial thereon.

The Court erred in finding, ruling and adjudging that Appellant's said claim and judgment was an unsecured claim and not entitled to any lien or priority of payment, and that said claim and judgment had, prior to such order, ruling and judgment, been correctly and finally determined to be an unsecured claim and not entitled to any lien or priority of payment, and that Appellant is now estopped from asserting a claim for preference and priority of payment.

The Special Master reporting upon Appellant's claim and judgment was appointed and authorized only to hear and report upon, and not to decide, claims referred to him by the Court and his report was merely a recommendation to the Court and it was the Court's exclusive province and duty to determine and adjudge such claims and the classification and priority thereof.

The Appellant did not consent to the appointment of the Special Master, or the reference of his claim, and is therefore not bound or concluded by the Special Master's find-

ings or report thereon. Although required by the Order of Court to do so, the Special Master failed to give any notice to Appellant relative to the time and place at which he [fol. 113] would settle his report or relative to the time within which Appellant might file Exceptions thereto, or relative to the time the Report would be filed, and accordingly Appellant is not bound by such Report and the time within which he should file Exceptions has not been fixed.

The Court erred in finding and ruling that the time has long since passed for filing Exceptions to such report.

The Court erred in ignoring the fact that such report of the Special Master was never confirmed by the Court.

Upon the face of the Special Master's Report on Appellant's claim and judgment, there is manifest error in the Special Master's Findings of Fact and Conclusions of Law, and the Court should have noticed such errors, and erred in failing and refusing to do so. Notwithstanding the absence of Exceptions to a Special Master's Report a court has authority to, and should, disregard erroneous Conclusions of Law and erroneous Findings of Fact appearing in and upon the face of such report.

A Special Master's Report is never final as to his erroneous Conclusions of Law, notwithstanding the absence of any Exceptions thereto, and is never final as to erroneous Findings of Fact apparent upon the face of such report, notwithstanding the absence of any Exceptions thereto.

Equity follows the law, and therefore even in an Equity Receivership Proceeding, and independent of every other consideration, Appellant's claim and judgment, being for personal injuries sustained by him as an employee of Wabash Railway Company, a railroad engaged in Interstate Commerce, should be accorded priority and paid as an operating expense as provided by the provisions of the Bankruptcy Act relating to the reorganization of railroads engaged in Interstate Commerce.

[fol. 114] Under the provisions of Section 1104 and 1105, R. S. Missouri, 1929, Appellant's judgment recovered on February 13, 1931 in the Circuit Court of the City of St. Louis, Missouri, became upon such date and ever since has

been, a lien upon the real estate of Wabash Railway Company, situate in the City of St. Louis, Missouri, and the Court in subsequently taking possession of such property by the appointment of receivers on December 1, 1931, took such possession and holds the same subject to Appellant's said lien. The Receivers' possession of property of Wabash Railway Company has been, and is, subject to all other lien rights of Appellant.

Appellant is an Indiana Corporation and the owner of property, and owns and operates railway lines in Indiana, Missouri and Ohio.

Under the law of the State of Missouri, and under the law of the State of Indiana, Appellant's claim and judgment was, and is, a prior and secured claim and entitled to payment as operating expenses.

Under the law of Ohio, and particularly Sections 9079 to 9090, both inclusive, of Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1934, and the Law of Ohio, as stated in the case of "King, et al. vs. Thompson, et al., 110 Fed. Reports, 319", Appellant's claim and judgment is a prior claim and a lien upon and prior to any mortgage lien on the property and railway lines of Wabash Railway Company in Ohio.

Under the orders and classification made by the Interstate Commerce Commission by an Order effective July 1, 1914, prescribing a classification of operating revenues and operating expenses for the use of carriers by rail, Appellant's said judgment and claim is and should be considered, treated and paid as an operating expense.

The Court should not, by means of an Equity Proceeding, [fol. 115] or through a continuation of the same, cause or permit Appellant to be deprived of the right to have his claim and judgment paid as a prior claim and as an operating expense, as intended by Congress and provided in the applicable sections of the Bankruptcy Act relating to the reorganization of railroads.

Independent of every other consideration, Appellant's claim and judgment being for and on account of injuries

sustained by him while in the course of performing his duties as an employee of Wabash Railway Company, was and is a prior claim and arose and grew out of the operation of said railroad and is entitled to and should be paid as an operating expense.

The said orders, rulings and judgment of said District Court here appealed from, in violation of and contrary to the Fifth Amendment to the Constitution of the United States, deprive Appellant of his property without due process of law, and contrary to and in violation of Article Fourth of the Constitution of the United States, fail to give full faith and credit to the aforesaid judgment recovered by Appellant in the Circuit Court of the City of St. Louis, Missouri.

The Court erred in concluding, ruling and adjudging that the Petition which Appellant sought leave to file states no cause of action in equity, and that the granting of leave to file the same would merely serve to encumber and delay the orderly process of the above mentioned Constituent Causes toward a reorganization of the properties of Wabash Railway Company.

The said orders, rulings and judgment of said District Court made and entered on August 31, 1938, and each and all of the same, are erroneous and against the law and against equity.

MARK D. EAGLETON and
HYMAN G. STEIN,
By Hyman G. Stein,
Attorneys for Peter J. Carpenter, Appellant.

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[fol. 116] Acknowledgment of Service.

The undersigned hereby acknowledge the receipt and service upon them, this 30th day of September, 1938, of a

(Appellant) of The Points On Which He Intends To Rely On His Appeal".

T. J. MOSS TIE COMPANY,
By Fred L. Williams & Earl F. Nelson,
Its Attorneys.

WABASH RAILWAY COMPANY,
By Homer Hall, Its Attorney. NSB.

FRANK C. NICODEMUS, JR., and NORMAN B. PITCAIRN, Receivers of Wabash Railway Company,
By Nat S. Brown, Their Attorney.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, etc.,
By Nagel, Kirby, Orick & Shepley,
Its Attorneys.

THE CENTRAL HANOVER BANK & TRUST COMPANY, Trustee, etc.,
By Larkin, Rathbone & Perry,
Fordyce, White, Mayne, Williams & Hartman,
Its Attorneys.

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[fol. 117] Designation of Contents of Record On Appeal of Peter J. Carpenter.

(Filed Oct. 1, 1938.)

Now comes Peter J. Carpenter and hereby designates the following portions of the record to be contained in the [fol. 118] record on the appeal taken by him on September 30, 1938, in the above entitled Consolidated Cause, to the United States Circuit Court of Appeals for the Eighth Circuit.

I.

The Bill of Complaint filed December 1, 1931, by T. J. Moss Tie Company, as Complainant, against Wabash Railway Company, as Defendant, in Cause entitled "T. J. Moss Tie Company, Complainant, vs. Wabash Railway Company, Defendant, in Equity No. 9704";

II.

Answer filed by Wabash Railway Company to said Bill of Complaint on December 1, 1931;

III.

Order of December 1, 1931 entered in said Cause In Equity No. 9704, appointing Walter S. Franklin and Frank C. Nicodemus, Jr. Receivers of Wabash Railway Company, granting Injunction, etc., and which Order is entitled "Order Appointing Receivers";

IV.

Minute entry showing the filing by said Receivers of their Bond and the Court's approval of same;

V.

Order of December 3, 1931 appointing Nat S. Brown general counsel of the Receivers;

VI.

Order of March 19, 1932 appointing Forrest C. Donnell Special Master;

VII.

Order of April 7, 1932 entitled "Order In Regard To The Filing of Claims";

[fol. 119]

VIII.

So much of Receiver's Inventory filed on February 26, 1932, as sets forth location of lines of railroad of Wabash Railway Company, general description of other property, and statement of securities owned and pledged;

IX.

Resignation of Walter S. Franklin as Receiver, filed October 19, 1933, and Order of that date accepting such resignation;

X.

Order filed October 19, 1933, appointing Norman B. Pitcairn as a Receiver;

XI.

So much of the Partial Report of Forrest C. Donnell, Special Master, filed March 7, 1936, as relates to the claim of Peter J. Carpenter, and being the introductory portion paragraph One, Item 3 of Paragraph Two, Paragraph Three (excepting names of claimants and matters dealing with claims other than that of Peter J. Carpenter) paragraph Four;

XII.

Minute Entry of March 1, 1937, showing the filing by leave on that date of Bill of Complaint of the Chase National Bank of the City of New York, as Trustee, etc., as Plaintiff, against Wabash Railway Company, as Defendants, and style of, and number assigned to, such Cause;

XIII.

Order of March 1, 1937, consolidating Causes 9704 and 12099 as Consolidated Cause In Equity No. 12099 and appointing Norman B. Pitcairn and Frank C. Nicodemus, Jr. as Receivers in said Consolidated Cause, etc.;

[fol. 120]

XIV.

Minute Entry of November 1, 1937, showing the granting of leave to, and the filing of Bill Of Complaint by Central Hanover Bank & Trust Company, Trustee, etc., and minute entry showing style of, and number assigned to, such Cause;

XV.

Order of November 1, 1937, consolidating Causes No. 9704, 12099 and 12357, as Consolidated Cause In Equity No. 12099, appointing Norman B. Pitcairn and Frank C. Nicodemus, Jr. as Receivers in said Consolidated Cause, etc.;

XVI.

Supplemental Order of November 4, 1937 on Bill Of Complaint of Central Hanover Bank & Trust Company, as Trustee, etc.;

XVII.

Notice and Application of Peter J. Carpenter, filed Jan-

minating Receivership of Wabash Railway Company and dissolving Temporary Restraining Order and Injunction, in the form thereto attached, and also said Petition and the Entry and Order of January 26, 1938, showing the filing by leave of Court of said Notice and Application with said Petition thereto attached;

XVIII.

Entry and Order of April 4, 1938 showing submission on that date of said Application of Peter J. Carpenter for leave to file his said Petition;

XIX.

Order and Decree made and entered in said Consolidated Cause on August 31, 1938, upon and in connection with said Application and Petition of Peter J. Carpenter, and also the Court's Findings Of Fact and Conclusions Of [fol. 121] Law relative thereto, filed in said Consolidated Cause on said August 31, 1938;

XX.

Notice Of Appeal filed by Peter J. Carpenter on September 30, 1938, and proof of mailing of copies of same by the Clerk to the Appellees;

XXI.

Order of September 30, 1938 granting Appellant leave to deposit, and approving, cash bond on appeal and entry showing deposit of said cash bond with the Clerk on said date;

XXII.

Statement of Peter J. Carpenter of the Points on which he intends to rely on his Appeal and Acknowledgment of Service of said statement, filed September 30, 1938;

XXIII.

Minute entries showing filing and entering of the above mentioned portions of the record;

XXIV.

This designation of contents of record on appeal, together with Acknowledgment of Service thereof on Appellees and minute entry showing filing of same.

MARK D. EAGLETON and
HYMAN G. STEIN,
By Hyman G. Stein,
Attorneys for Appellant, Peter J. Carpenter.

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[fol. 122] Acknowledgment of Service.

The undersigned hereby acknowledge the receipt and service upon them, this 30th day of September, 1938, of a copy of the foregoing "Designation Of Contents Of Record On Appeal Of Peter J. Carpenter".

T. J. MOSS TIE COMPANY,
By Fred L. Williams & Earl F. Nelson,
Its Attorneys.

WABASH RAILWAY COMPANY,
By Homer Hall, Its Attorney. NSB.

FRANK C. NICODEMUS, JR., and
NORMAN B. PITCAIRN, Receivers
of Wabash Railway Company,
By Nat S. Brown, Their Attorney.

THE CHASE NATIONAL BANK OF
THE CITY OF NEW YORK, as
Trustee, etc.,
By Nagel, Kirby, Orick & Shepley,
Its Attorneys.

THE CENTRAL HANOVER BANK &
TRUST COMPANY, Trustee, etc.,
By Larkin, Rathbone & Perry,
Fordyce, White, Mayne, Williams &
Hartman,
Its Attorneys.

[fol. 123] Clerk's Certificate.

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

I, Jas. J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri Do Hereby Certify the above and foregoing to be a full, true and complete transcript (except insofar as the same is restricted by the praecipe for transcript heretofore set out) of the record and proceedings in cause No. 12099, In Equity, wherein The Chase National Bank of the City of New York, as Trustee is complainant and Wabash Railway Company, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers, etc., et al., are defendants, as fully as the same remains on file and of record in my office.

Seal
U. S. Dist. Court
East. Div. of the
East. Jud. Dist.
of Mo.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at office in the City of St. Louis, in said Division of said District this 4th day of November, in the year of our Lord, Nineteen Hundred and Thirty-eight.

JAS. J. O'CONNOR,
Clerk of said Court.
By C. E. Rudolph,
Deputy.

Filed Nov. 5, 1938. E. E. Koch, Clerk.

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[fol. 1] (Order of U. S. District Court directing that certified copies of Claim of Peter J. Carpenter and Proceedings before Special Master be forwarded to Appellate Court, etc.)

In the District Court of the United States, for the Eastern District of Missouri, Eastern Division.

The Chase National Bank of The City of New York, as Trustee, Plaintiff,
No. 12099. vs. In Equity.
Wabash Railway Company, et al., Defendants.

Consolidated Cause.

In the Matter of

The Petition of Peter J. Carpenter for leave to file an intervening petition.

It having been made to appear to the Court that there has been omitted from the transcript of the record of this Court filed in the United States Circuit Court of Appeals, Eighth Circuit, on the appeal of Peter J. Carpenter, the claim originally filed by Peter J. Carpenter against Wabash Railway Company, before the Special Master, Forrest C. Donnell, and the record of the proceedings before the Special Master upon the presentation and hearing of the claim of Peter J. Carpenter, as the same appears in the report of the Special Master filed in this Court, and that the claim filed and the proceedings thereon before the Special Master are material to the Appellees on said appeal from the order and decree of this Court thereon and have been omitted from the record by error or accident, it is therefore

Ordered,

That the Clerk of this Court prepare, certify and transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a supplemental record consisting of (1) the original claim of Peter J. Carpenter against Wabash Railway Company filed with the Special Master, and (2) the proceedings before the Special Master upon the presentation and hearing of the said claim of Peter J. Carpenter, as said claim and said proceedings before the Special Master appear in the report of the Special Master upon the said claim of Peter J. Carpenter filed in this Court in T. J. Moss Tie Company, Complainant, vs. Wabash Railway Company, Defendant, No. 9704, on the 7th day of March, 1936.

[fol. 2] It Is Further Ordered,

That the date March 7, 1937, appearing in Paragraph 8 of the Court's Findings of Facts as the date on which the report of the Special Master on the claim of Peter J.

Carpenter was filed, be changed to March 7, 1936, which is the date said report was filed.

CHARLES B. DAVIS,
Judge.

Dated December 2, 1938.

Endorsed: Filed Dec. 2, 1938, Jas. J. O'Connor, Clerk.

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[fol. 3] United States of America,
Eastern District of Missouri—ss.:

I, Jas. J. O'Connor, Clerk of the United States District Court in and for the Eastern District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original order filed December 2, 1938, directing the [the] Clerk of the District Court to certify and transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a supplemental record in the appeal of Peter J. Carpenter against the Wabash Railway Company, in consolidated cause No. 12099, wherein The Chase National Bank of the City of New York, as Trustee is plaintiff and The Wabash Railway Company, et al. are defendants, now remaining among the records of the said Court in my office.

Seal
U. S. Dist. Court
East. Div. of the
East. Jud. Dist.
of Mo.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at St. Louis, Missouri, this 3rd day of December, A. D. 1938.

JAS. J. O'CONNOR,
Clerk.

By C. E. Rudolph,
Deputy Clerk.

(Endorsed): No. 11,354. Certified copy of Order for transmission of Claim of Peter J. Carpenter and Proceedings before Special Master in connection with such Claim, etc. Filed in U. S. Circuit Court of Appeals on December 3, 1938.

[fol. 4] (Proceedings before Special Master upon presentation and hearing of Claim of Peter J. Carpenter.)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

T. J. Moss Tie Company, Complainant,
No. 9704. vs. In Equity.
Wabash Railway Company, Defendant.

Before Forrest C. Donnell, Special Master.

In the Matter of the claim of Peter J. Carpenter: (hereinbelow termed the Claimant):

On this 26th day of August, 1935, at ten o'clock A.M., before the above mentioned Special Master, at his office, Suite 1103 in the Telephone Building, 1010 Pine street, St. Louis, Missouri, the hearing of the above claim was entered upon.

Let the record show the following:

1. That hitherto on or prior to July 1, 1932, the claim of the above mentioned claimant was filed with said Special Master.

2. That hitherto, to-wit, on August 31, 1932, the answer of the Receivers of the defendant in the above entitled cause was filed with said Special Master.

3 That, as to the above mentioned claim, the Special Master did, by notice mailed on the 9th day of August, [fol. 5] 1935, in the United States mail in an envelope upon which was requisite United States postage, give notice of the time and place in the City of St. Louis, Missouri, to-wit, the 26th day of August, 1935, at ten o'clock A. M., at the office of said Special Master, Suite 1103 Telephone Building, 1010 Pine street, St. Louis, Missouri, when the above mentioned Claimant will be given an opportunity to present and make proof, before said Special Master, of the amount of his claim and the lien and priority, if any, thereof, and to present his objections, if any, to the allowance of the claims of any and all other creditors presented to said Special Master.

4. That all the solicitors of record in this cause were, by notice mailed on August 9, 1935, in the United States

mail in an envelope upon which was requisite United States postage, given notice of the time and place of the hearing of the above mentioned claim to be held August 26, 1935, at ten o'clock A. M., before said Special Master, at the office of said Special Master, Suite 1103 Telephone Building, 1010 Pine Street, St. Louis, Missouri.

5. That at the time and place first hereinabove mentioned there was present F. D. Fauser appearing on behalf of the defendant, Wabash Railway Company, and on behalf of the Receivers of said defendant.

There was also present R. P. Elam and Theodore Bruere appearing on behalf of the Claimant.

[fol. 6] There was also present E. J. Barker appearing on behalf of the Reconstruction Finance Corporation.

The Special Master: Let the record also show the personal representation of Mr. Theodore Bruere at this time.

What is the situation in this matter?

Mr. Elam: In support of this claim I wish to offer in evidence this certified copy of the judgment of the Circuit Court of the City of St. Louis.

The Special Master: You are referring, Mr. Elam, to the certified copy, under date August 13, 1935, by the Clerk of the Circuit Court of the City of St. Louis, of the judgment rendered by the last mentioned court on July 6, 1934, at the June Term thereof, in case No. 142443-B, in suit entitled Peter J. Carpenter vs. Wabash Railway Company, a corporation, is that correct?

Mr. Elam: Yes. That judgment, however, is entered in pursuance to a mandate, as you will note.

The Special Master: That is right.

Mr. Elam: The judgment is for $10,000, as of the 13th day of February, 1931, and, of course, costs. I do not have the cost bill.

The Special Master: Anything further to be offered in this matter?

Mr. Elam: Yes; I would like to have leave to submit at a future date the cost bill of the Circuit Court as soon as [fol. 7] it has been prepared.

The Special Master: Any objection to either of these offers, Mr. Fauser?

Mr. Fauser: No. We agree further that the claim be allowed as set out in the judgment.

The Special Master: It is in the sum of $10,000 with interest thereon at the rate of six percent per annum from the 13th day of February, 1931, to the date of the beginning of the receivership, is that correct?

Mr. Fauser: Yes.

The Special Master: That is to December 1, 1931?

Mr. Fauser: Yes.

Mr. Elam: And costs.

The Special Master: I understand from you the cost bill will be submitted?

Mr. Elam: I will submit it.

The Special Master: Is there [anthing] to be said by you, Mr. Barker, in that regard?

Mr. Barker: No, sir, it is perfectly agreeable to us.

The Special Master: Nothing on behalf of the Reconstruction Finance Corporation?

Mr. Barker: No, our only interest is to see they are properly filed and judgment properly entered.

(Thereupon the reporter marks said certified copy of [fol. 8] judgment as "Exhibit A", and said Exhibit is attached to this record.)

The Special Master: On this 6th day of January, 1936, there being present Robert P. Elam, attorney for claimant, the Special Master determined that, pursuant to bill of costs, being attached and marked "Exhibit B", hitherto presented to the Special Master by counsel for claimant in the above matter, the court costs hereinbefore referred to are hereby determined to be the sum of $104.15, where-

fore, the Special Master determines that he shall report to the Court,

(a) That said claim, to the extent of $10,000.00 principal, plus $104.15, court costs, plus interest on said principal amount of $10,000.00, at the rate of 6% per annum from February 13, 1931, to December 1, 1931, is correct and valid, and should be allowed in the aggregate of the said principal sum, court costs and interest, as a general unsecured claim, and that judgment should be entered thereon in the above entitled cause in favor of said claimant Peter J. Carpenter, and against defendant, Wabash Railway Company, in said aggregate amount;

(b) That said claim is not entitled to any lien or to any priority over other general unsecured claims.

FORREST C. DONNELL,
Special Master.

Endorsed: Filed, Mar. 7, 1936. Jas. J. O'Connor, Clerk.

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[fol. 9] Exhibit A.

FW Huf

(Judgment.)

State of Missouri,
City of St. Louis—ss.:

In the Circuit Court of the City of St. Louis.

June Term, 1934.

Friday, July 6th, 1934.

Peter J. Carpenter,
142443-B vs.
Wabash Railway Company, a corporation.

Now at this day the Court in obedience to the mandate of the Supreme Court of Missouri heretofore filed herein, on the 2nd day of June 1934, doth order that the verdict and judgment heretofore rendered herein on the 13th day of February 1931, in favor of plaintiff and against the defendant for the sum of $15,000.00, be set aside and vacated and for naught held and that a new judgment be rendered

in favor of plaintiff and against the defendant as of said date, in the sum of $10,000.00.

Wherefore, it is considered and adjudged by the Court that plaintiff have and recover of the defendant the sum of Ten Thousand and 00/100 Dollars ($10,000.00) with interest thereon at the rate of 6% per annum from said 13th day of February, 1931, until paid, together with the costs of this suit and have therefor execution.

[fol. 10] State of Missouri,
City of St. Louis—ss.:

I, H. Sam Priest, Clerk of the Circuit Court, City of St. Louis within and for the City and State aforesaid, certify the above and foregoing to be a full, true and complete transcript of the judgment rendered in the above entitled cause, as fully as the same remains of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at office, in the City of St. Louis, this 13th day of August, 1935.

(Seal)

#14

H. SAM PRIEST,
Clerk, Circuit Court.

Endorsed: Filed March 7, 1936, Jas. J. O'Connor, Clerk.

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[fol. 11] Statement of Claim of Peter J. Carpenter.

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

T. J. Moss Tie Company, Plaintiff,
No. 9704. vs. In Equity.
Wabash Railway Company, a corporation, Defendant.

Name: Peter J. Carpenter,

Address: 515 Emmons Ave., St. Charles, Missouri.

Amount of Claim: $15,000.00, together with interest thereon at the rate of 6% per annum from the 14th day of February, 1931.

Nature of Claim: This claim is based upon a judgment in the amount of $15,000.00, together with interest thereon at the rate of 6% per annum, from the date of rendition, said judgment having been made and entered on the 14th day of February, 1931, in Division #14 of the Circuit Court of the City of St. Louis, Missouri, in the case of Peter J. Carpenter vs. Wabash Ry. Co., a corporation, being Cause #142,443, of the Circuit Court of the City of St. Louis, Missouri. An appeal from said judgment was taken by the defendant Wabash Ry. Co. on December 4, 1931, and is now pending in the Supreme Court of the State of Missouri.

Attorneys: Mark D. Eagleton and Harry M. Stone,
1020 Telephone Bldg.,
St. Louis, Missouri.

PETER J. CARPENTER.

State of Missouri,
County of —ss.:

Peter J. Carpenter, the above named claimant, being duly sworn upon his oath, deposes and says that he has read the foregoing statement of claim, and that the facts therein stated are true to the best of his knowledge and belief; that he has given credit to the Wabash Railway Company for all payments and offsets to which it is justly entitled, and that the amount now due and owing to him from the Wabash Railway Company is as stated above.

PETER J. CARPENTER.

[fol. 12] Subscribed and sworn to before me this 9 day of June, 1932.

My commission expires July 23rd, 1935.

(Seal) MAX J. FREY,
Notary Public.

Endorsed: Filed, March 7, 1936. Jas. J. O'Connor, Clerk.

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[fol. 13] United States of America,
Eastern District of Missouri—ss.:

I, Jas. J. O'Connor, Clerk of the United States District Court in and for the Eastern District of Missouri, do here-

by certify that the annexed and foregoing is a true and full copy of the original Report of Proceedings before Forrest C. Donnell, Special Master, together with statement of claim of Peter J. Carpenter attached thereto, filed on March 7, 1936, in case #9704, as well as Exhibit A attached to the aforesaid Report.

T. J. Moss Tie Company,
vs.
Wabash Railway Company.

now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at St. Louis, Missouri this 28th day of November, A. D. 1938.

Seal
U. S. Dist. Court
East. Div. of the
East. Jud. Dist. of
Missouri.

JAMES J. O'CONNOR,
Clerk.

By Harold G. Pryce,
Deputy Clerk.

(Endorsed): No. 11,354. Certified copy of Claim of Peter J. Carpenter and Proceedings before Special Master on such Claim. Filed in U. S. Circuit Court of Appeals on December 3, 1938.

In the District Court of the United States For the Eastern Judicial District of Missouri, Eastern Division.

T. J. Moss Tie Company, Complainant,
No. 9704. vs. In Equity.
Wabash Railway Company, Defendant.

Before Hon. Forrest C. Donnell, Special Master.

In the Matter of

The Claim of Peter J. Carpenter, Claimant.

Answer.

Come now Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, defendant in the above entitled cause, and, for answer to the claim filed by the above named claimant, state that they admit that judgment was rendered against said defendant as alleged.

The Receivers for further answer state that they deny that the claim is entitled to any preference or priority in payment.

Wherefore, having fully answered, the Receivers pray that, if the claim be allowed, it be not classified as entitled to any priority or preference in payment.

WALTER S. FRANKLIN and
FRANK C. NICODEMUS, JR.,
Receivers, Wabash Railway Company,
By N. S. Brown,
Homer Hall,
Attorneys for Receivers.

Filed Aug. 31, 1932.

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United States of America,
Eastern District of Missouri.—ss.:

I, Jas. J. O'Connor, Clerk of the United States District Court in and for the Eastern District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original answer as contained in the "Transcript of Record and Proceedings" before Forrest C. Donnell, Special Master, filed herein March 7th, 1936, In Re: claim of Peter J. Carpenter, pursuant to order of Hon.

Charles B. Davis under date of December 2, 1938 and inadvertently omitted from supplemental transcript of record certified under date of November 28, 1938, which said supplemental transcript of record contains the documents subsequently ordered transmitted by said order of December 2, 1938, except the answer as herein certified.

The Chase National Bank of the City of New York, as Trustee, etc.,
No. 12,099. vs. In Equity.
Wabash Railway Company, a corp., et al.

Consolidated Cause.

now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at St. Louis, Missouri, this 17th day of January, A. D. 1939.

Seal
U. S. Dist. Court
East. Div.
East. Jud. Dist.
of Mo.

JAS. J. O'CONNOR,
Clerk.

By C. E. Rudolph,
Deputy Clerk.

(Endorsed): No. 11,354. Certified copy of Answer omitted from certified copy of Proceedings before Special Master heretofore filed pursuant to order of U. S. District Court. Filed in U. S. Circuit Court of Appeals on January 17, 1939.

[fol. 111] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals, Eighth Circuit.

Peter J. Carpenter, Appellant,
No. 11,354. vs.
Wabash Railway Company, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

HYMAN G. STEIN,
MARK D. EAGLETON,
c/o H. G. S.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 5, 1938.

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(Appearance of Mr. N. S. Brown and Mr. Homer Hall as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

N. S. BROWN,
HOMER HALL,

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 9, 1938.

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[fol. 112] (Appearance of Mr. Allen C. Orrick and Mr. Arthur B. Shepley, Jr., as Counsel for Appellee Chase National Bank, as Trustee.)

The Clerk will enter my appearance as Counsel for the Appellee, The Chase National Bank of the City of New York, as Trustee.

ALLEN C. ORRICK,
ARTHUR B. SHEPLEY, JR.,
319 North Fourth Street

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 10, 1938.

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(Appearance of Mr. Fred L. Williams and Mr. Earl F. Nelson as Counsel for Appellee T. J. Moss Tie Company.

The Clerk will enter my appearance as Counsel for the Appellee T. J. Moss Tie Company.

FRED L. WILLIAMS,
EARL F. NELSON,
1907 Boatmens Bank Bldg.,
St. Louis, Mo.
Attorneys for T. J. Moss Tie Company, Appellee.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 17, 1938.

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[fol. 113] (Appearance of Mr. A. M. Lewis, Mr. Hovey C. Clark, Mr. Thomas W. White and Mr. G. Carroll Stribling as Counsel for Appellees.)

The Clerk will enter our appearance as Counsel for the Appellees.

A. M. LEWIS,
HOVEY C. CLARK,
THOMAS W. WHITE,
G. CARROLL STRIBLING,
Attys. for Central Hanover Bank & Trust Co., Trustee under First Mortgage.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 23, 1938.

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(Order of Submission.)

March Term, 1939.

Thursday, March 23, 1939.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Hyman G. Stein

for appellant, continued by Mr. Arthur B. Shepley, Jr., for appellee Chase National Bank of the City of New York, as Trustee, and by Mr. Homer Hall for appellee Wabash Railway Company, and concluded by Mr. Hyman G. Stein for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

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[fol. 114] (Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 11,354.—MAY TERM, A. D. 1939.

| | |
|---|---|
| Peter J. Carpenter, Appellant, vs. Wabash Railway Company, et al., Appellees. | Appeal from the District Court of the United States for the Eastern District of Missouri. |

[May 13, 1939.]

Mr. Hyman G. Stein (Mr. Mark D. Eagleton and Mr. Roberts P. Elam on the brief) for appellant.

Mr. Arthur B. Shepley, Jr. (Mr. Allen C. Orrick on the brief) for appellee, The Chase National Bank of the City of New York, as Trustee.

Mr. Homer Hall (Mr. Nat S. Brown, Solicitor for Appellees Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers, on the brief) for Appellee Wabash Railway Company.

Mr. Hovey C. Clark, Mr. Thomas W. White and Mr. G. Carroll Stribling, submitted brief for Appellee Central Hanover Bank and Trust Company, as Trustee under the First Mortgage of Wabash Railroad Company.

Before SANBORN, THOMAS and VAN VALKENBURGH, Circuit Judges.

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VAN VALKENBURGH, Circuit Judge, delivered the opinion of the court.

February 13, 1931, appellant herein, plaintiff below, recovered in the Circuit Court of the City of St. Louis, Missouri, a judgment against the Wabash Railway Company in the sum of $15,000 for injuries sustained in the course of his employment as an employee of said company. On appeal to the Supreme Court of Missouri this judgment was affirmed on condition that a remittitur of $5,000 be entered. This was done and the judgment in the sum of $10,000 stands as of February 13, 1931. December 1, 1931, the T. J. Moss Tie Company, a Missouri Corporation, filed in the District Court of the United States for the Eastern District of Missouri its bill of complaint against the Wabash Railway Company, an Indiana Corporation, alleging that complainant was a general unsecured creditor of the Wabash; that the properties of the Railway Company were heavily mortgaged, that it was insolvent and unable to pay its debts, and praying the appointment of receivers. The railway company filed answer admitting the allegations of the bill and consenting to the appointment of receivers. On December 1, 1931, an order was entered appointing receivers and containing the usual injunctive provisions.

March 1, 1937, the Chase National Bank of the City of New York, Trustee under the Refunding and General Mortgage of the Wabash Railway Company dated January 1, 1925, by leave filed its bill for foreclosure of the lien of said mortgage, for the appointment of receivers, and for the impounding of the income from the mortgaged property. Thereupon the same persons theretofore appointed in the Tie Case were named as receivers in the Chase National Bank case, and the two causes were carried as consolidated cause in Equity, No. 12099.

November 1, 1937, the Central Hanover Bank and Trust Company of New York, as trustee under the first mortgage of the

Wabash Railway Company, dated May 1, 1889, filed its bill, alleging default in the payment of interest on the bonds secured by its mortgage, praying for the appointment of receivers, the impounding of the rents, issues, and profits, and for other relief. The same persons were appointed as receivers and, November 4, 1937, an impounding order was entered, as prayed, in the consolidated causes. May 4, 1938, the said Central Hanover Bank and Trust Company filed its amended and supplemental bill praying for foreclosure of its lien, and it was thereupon ordered that the orders entered in said cause upon November 1, 1937, and November 4, 1937, be deemed to have been entered upon said amended and supplemental bill of complaint.

March 19, 1932, the district court appointed Forrest C. Donnell as Special Master to whom should be referred, "for his investigation, determination and report" all claims, etc. by which the claimant sought to recover any money or property from the receivers out of the estate in their hands. The Master was directed to proceed with all reasonable dispatch to hear and determine the matters presented and to report his findings to the court. The order of appointment contained this further language:

"Before settling his report in any contested case the Special Master shall give to the parties in interest reasonable notice of the time when and the place where he will finally settle such report, and of the fact that they may appear before him and file such exceptions to the same as they may desire".

All persons were required to file their claims before the Special Master on or before July 1, 1932, and to make proof of the amounts, and the lien and priority, if any, thereof. Accordingly, in June, 1932, appellant made a provisional filing of his claim, embodying a judgment for $15,000, then on appeal. This judgment was reduced to $10,000 by the Supreme Court of Missouri June 2, 1934. The hearing before the Special Master was held August 26, 1935. The receivers had filed answer admitting the rendition of the judgment, and denying any preference or priority. Mr. R. P. Elam, counsel for the claimant, then offered a certified copy of the judgment as finally modified, together with a statement of costs. Other counsel present were Theodore Bruere on behalf of claimant, Mr. F. D. Fauser appearing for the Wabash Company and the Receivers, and Mr. E. J. Barker for the Reconstruction Finance Corporation. After the presentation of the cer-

tified copy of the judgment had been received the Special Master asked: "Anything further to be offered in this matter?"

Mr. Elam: "Yes, I would like to have leave to submit at a future date the cost bill of the Circuit Court as soon as it has been prepared".

The Special Master: "Any objection to either of these offers, Mr. Fauser?"

Mr. Fauser: "No, we agree further that the claim be allowed as set out in the judgment".

"The Special Master: It is the sum of $10,000 with interest thereon at the rate of six per cent per annum from the 13th day of February, 1931, to the date of the beginning of the receivership, is that correct?

Mr. Fauser: Yes.

The Special Master: That is to December 1, 1931?

Mr. Fauser: Yes.

Mr. Elam: And costs.

The Special Master: I understand from you the cost bill will be submitted?

Mr. Elam: I will submit it.

The Special Master: Is there anything to be said by you, Mr. Barker, in that regard?

Mr. Barker: No, sir, it is perfectly agreeable to us.

The Special Master: Nothing on behalf of the Reconstruction Finance Corporation?

Mr. Barker: No, our only interest is to see they are properly filed and judgment properly entered.

(Thereupon the reporter marks said certified copy of judgment as 'Exhibit A', and said Exhibit is attached to this record).

The Special Master: On this 6th day of January, 1936, there being present Robert P. Elam, attorney for claimant, th Special

Master determined that, pursuant to bill of costs, being attached and marked 'Exhibit B', hitherto presented to the Special Master by counsel for claimant in the above matter, the court costs hereinbefore referred to are hereby determined to be the sum of $104.15, wherefore, the Special Master determines that he shall report to the court,

(a) That said claim to the extent of $10,000.00, principal, plus $104.15, court costs, plus interest on said principal amount of $10,000.00, at the rate of 6% per annum from February 13, 1931, to December 1, 1931, is correct and valid, and should be allowed in the aggregate of the said principal sum, court costs and interest, as a general unsecured claim, and that judgment should be entered thereon in the above entitled cause in favor of said claimant Peter J. Carpenter, and against defendant, Wabash Railway Company, in said aggregate amount;

(b) That said claim is not entitled to any lien or to any priority over other general unsecured claims'".

January 26, 1938, appellant filed in the district court his application for leave to file his petition for order terminating the receivership of the Wabash Railway Company, and dissolving the temporary restraining order and injunction. The petition presented therewith is very prolix and too long to be incorporated in full herein. The grounds for the relief asked are in substance the following:

That Kuhn, Loeb & Company, an investment banking organization of New York, is, and for many years has been, the banker for the Pennsylvania Railroad Company. That it also had and exercised control of the Wabash Railway Company and its financial policies and investments in 1926. That the Pennsylvania Railroad Company participated and connived with Kuhn, Loeb & Company in a course of conduct whereby the Wabash Railway Company purchased and acquired Lehigh Valley Railroad Company stock. In this manner the Pennsylvania Railroad Company acquired working control of the Wabash Railway Company and the Lehigh Valley Railroad Company, and Kuhn, Loeb & Company collected and received, fees, commissions and profits in excess of $1,000,000, and sold to the Wabash Railway Company, at great profit to itself, stocks owned by Kuhn, Loeb & Company. That this was accomplished by a conspiracy between this investment banking company and officers and directors of the Wabash Railway Company, thus

alleged to be controlled by Kuhn, Loeb & Company, and the Pennsylvania Railroad Company. The loss accruing to the Wabash Company from these transactions is alleged to exceed $20,000,000. The present receivers are alleged to be former executives of the Pennsylvania Railroad, or one of its subsidiaries; and, for that reason, and for the further reason that they are said to have taken no action relative to the losses sustained by the Wabash Railway Company as aforesaid, they are charged to be improper persons to act as such receivers. It is further alleged that, since the receivers were appointed, there have been practically no proceedings of a constructive nature looking to a final disposition of the consolidated causes and the termination of the receivership. It is asserted that the claim of appellant is one entitled to priority over the liens of the mortgages and is entitled to present payment. The relief prayed is:

"(1) That the said Norman B. Pitcairn and Frank C. Nicodemus, Jr., and each and both of them, be discharged as receivers of Wabash Railway Company.

(2) That the receivership of Wabash Railway Company as ordered in the above entitled Consolidated Cause and Constituent Causes be, by the order of this Honorable Court, terminated, and that the property of Wabash Railway Company be discharged from said receivership.

(3) That the Restraining Order made and entered by this Honorable Court on December 1, 1931, as aforesaid, and ordering that all persons be restrained and enjoined from interfering with, attaching, levying upon, or in any manner whatsoever, disturbing any portion of the property and premises of Wabash Railway Company, for which said receivers were appointed, be dissolved.

(4) That the Court, if it shall deem the same proper and best, afford unto Railway Company and its security holders the opportunity for a reasonable time not to exceed thirty (30) days, within which to institute proceedings under Section 77 of the National Bankruptcy Act for the reorganization of Wabash Railway Company, before making an order terminating the receivership and discharging the property of Wabash Railway Company therefrom, effective":

The trial court, in passing upon the application for leave to file appellant's proposed petition, made findings of fact as hereinabove

stated respecting the filings in the consolidated causes, and the proceedings in proof of appellant's claim before the master, and denied the application for the following stated reasons:

"(a) The petition which said petitioner seeks leave to file does not conform to the requirements of Equity Rule No. 37.

(b) The status and classification of petitioner's claim as an unsecured claim which is not entitled to any lien or priority of payment over any other unsecured claim has heretofore been correctly and finally determined in this cause, and said petitioner is now estopped from asserting a claim for preference and priority of payment over the many other unsecured creditors whose claims have been filed and allowed in these proceedings;

(c) The intervening petition which petitioner seeks leave to file states no cause of action in equity, and the granting of leave to file will merely serve to encumber and delay the orderly process of these cases toward a reorganization of the properties of the defendant Railway Company;

(d) The dismissal, as to said petitioner, of the injunctive provisions of the several orders of this Court appointing the receivers in the several constituent causes of this consolidated cause, without a dismissal of the said several causes, would be of no aid or benefit to said petitioner, since all of the properties of the defendant Railway Company would remain in the exclusive custody and control of the Court's receivers".

The decree of the court, being upon the application of appellant for leave to file his proposed petition, our determination must in effect be limited to a consideration of two questions, (a) is the claim of appellant entitled to priority over the liens of the mortgages in suit and to payment as such; and, (b) has appellant the absolute right to file and be heard upon a petition praying, as relief, the preservation and enforcement of his alleged prior lien, the termination of the receivership, and the dissolution of the injunctive orders incidental thereto?

We consider first the status of appellant's claim. No Statute of the State of Missouri, and no decisions of its courts that have been brought to our attention or have been disclosed by our investigation provide or hold that claims for personal injuries by employees are entitled to priority as operating expenses. *Barrie* v. *United Railways Co.*, 138 Mo. App. 557, and *Johnson* v. *United Railways*

*Co.*, 247 Mo. 326, cited by appellant in support of his contention do not so hold, but base their conclusions upon other grounds. The decisions of this court have been consistently against this contention. *Veatch, et al.*, v. *American Loan and Trust Company, et al.*, 79 F. 471; *Pitcairn, et al.*, v. *Fisher*, 78 F. (2d) 649. It is true that in some jurisdictions claims for injuries to employees of railroads while engaged in the discharge of the duties of their employment, are entitled to priority of payment as operating expenses. The Wabash Railway Company is an Indiana corporation. It is the contention of appellant that such is the state of the law in Indiana and Ohio, in which states the Wabash Company owns lines of railroad; that, therefore, the law of priority which the laws of these states accord to personal injury claims against railroads should be made applicable to all the properties of the Wabash wherever situated. Conceding, without deciding, that the laws of Indiana and Ohio are as stated by appellant, that situation can have no effect upon the operation and effect of this Missouri judgment.

"A judgment rendered in one state or country does not operate extra-territorially so as to constitute a lien on lands in another state or country". 34 C. J. 586, Sec. 897; 34 C. J. 508, Sec. 807, and cases cited.

"A judgment of one state when sought to be enforced in another, is not entitled to any right of priority; privilege, or lien which it may enjoy in the state where rendered, but only that which the *lex fori* may give to it in the character of a foreign judgment". 34 C. J. 1130, Sec. 1604, and citations.

By sub-section (n) of Section 77 of the Bankruptcy Act as amended, (11 U. S. C. A. Par. 205 [n]) claims for personal injuries to employees of a railroad corporation are entitled to priority. *Central Hanover Bank & Trust Company, et al.* v. *Williams; et al.*, (C. C. A. 8) 95 F. (2d) 210. But this subsection applies expressly to proceedings in bankruptcy, and at this stage, as charged in the proposed petition, this is an equity receivership. *Illinois Central Railroad Company* v. *United States Fidelity & Guaranty Company*, (C. C. A. 5) 87 F. (2d) 121. But apart from whether judgments of this nature normally have, or may have, priority rights over antecedent mortgage liens, we believe appellant is foreclosed by this record from asserting such rights in this action. The court in its conclusions of law found that the status and classification of petitioner's claim had been correctly and

finally determined as an unsecured claim and that the petitioner was estopped from asserting its preference and priority of payment. We think the record fully justifies this finding and conclusion.

It will be recalled that, in offering this claim for allowance, August 26, 1932, counsel for appellant made no reference to priority. The claim was expressly uncontested. Again, January 6, 1936, counsel for appellant being present, the Special Master announced specifically his determination respecting this claim, and the exact terms in which it should be finally reported to the court. To this announcement no exception was taken nor indicated. The claim throughout was treated as uncontested. That this was the common understanding of the language of the order appointing the Master is evident. The necessary notice of the time and place when and where the Master should finally settle his report and exceptions might be filed is restricted to contested cases. The order says:

"Before settling his report in any contested case".

The practice, in receivership proceedings involving a large number of creditors, to refer claims to a Master for determination is a common one. The court is ordinarily relieved from hearing uncontested cases. This accounts for the meticulous care of the Master in making explicit announcement of the terms of his report at the adjourned hearing in January, 1936. Counsel for claimant again was present and voiced no exceptions. For two full years thereafter no inquiry was made respecting the filing of this report. It is evident that the finding of the Special Master was accepted as final and conclusive, and the trial court rightly held appellant to be estopped from asserting a claim for preference and priority of payment over the many other unsecured creditors whose claims have been filed and allowed in these proceedings.

Now, as to the absolute right of appellant to file and be heard upon his proposed petition. The basis of his intervention is his interest as a claimant against the receivership estate. His claim has already been filed, and its status determined. No reason appears why it may not, and will not, ultimately be disposed of in like manner as other claims of the same nature without the necessity of special intervention. In such case leave to intervene will not be granted to an individual creditor. *Acme White Lead & Color Works* v. *Republic Motor Truck Co.* (D. C.) 285 F. 88; *Elkins* v. *First National Bank*, (C. C. A. 4) 43 F. (2d) 777, 779.

The latter case is peculiarly in point because it deals with "an application on the part of the petitioners to have themselves made parties to the receivership proceeding in order that they might determine a question as to priority in the allowance and payment of claims." In the instant case a Special Master had been appointed to pass upon just such questions, and, as we have seen, had decided the issue without objection. This is not a case where a denial of the right to intervene would be a practical denial of certain relief to which the intervener is fairly entitled and which can be obtained only by intervention, as defined by this court in *Credits Commutation Co., et al.* v. *United States,* 91 F. 570, 573.

One conclusion of law stated by the trial court as a ground for denying leave to file was that the petition sought to be filed did not conform to the requirements of Equity Rule No. 37, then in force. We are inclined to agree with the Chancellor in this conclusion, but we prefer to base our decision of this case upon broader grounds.

The trial court found from the record in this case and from the proceedings in the Consolidated Cause within its judicial knowledge that, pending ultimate disposition, the properties of the defendant Railway Company must remain in the custody and control of the court's receivers; and that the granting of leave to file, upon the basic grounds urged by the applicant, would serve merely to encumber and delay the orderly process toward a reorganization of the properties of the Railway Company. Compare *Blumgart* v. *St. Louis-San Francisco Ry. Co.*, (C. C. A. 8) 94 F. (2d) 712.

The Consolidated Cause in which the receivers have been appointed includes bills for foreclosure and impounding of income, rents, issues and profits under the provisions of prior and primary mortgages. There are no allegations and no claim that such mortgages are invalid, nor that their holders or trustees are parties to the practices charged to be fraudulent and illegal in the petition sought to be filed by appellant. It is apparent, as found by the trial court, that the dismissal of the injunctive orders and of those appointing the receivers would be of no aid to said petitioners without the dismissal of the several causes, and that to protect the prior lien holders in the rights and powers held and exercised by them, the properties of the defendant Railway Company must remain in the exclusive custody and control of the court's receivers. As indicated by conclusions of the trial court a reorganization is in process, and to the propriety of its terms when submitted objections may be entertained.

In cases involving the complexity of this Consolidated Cause large discretion is lodged in the district court. In exercising its discretion the court should consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. (Rules of Civil Procedure, 24b.) In denying the application to intervene we cannot say that discretion has been abused. Appellant has disclosed no legal interest as a claimant that has not already been recognized, and may not be realized in the orderly process without the drastic disorganization contemplated and prayed in the petition sought to be filed. The decree below accordingly is

*Affirmed.*

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[fol. 125] (Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1939.

Saturday, May 13, 1939.

Peter J. Carpenter, Appellant,
No. 11354. vs.
Wabash Railway Company, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, The Chase National Bank of the City of New York, as Trustee, Central Hanover Bank and Trust Company, as Trustee under the First Mortgage of the Wabash Railroad Company, dated May 1, 1889, and T. J. Moss Tie Company.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, affirmed with costs; and that the Wabash Railway Company, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, The Chase National Bank of the City of New York, as Trustee, Central

Hanover Bank and Trust Company, as Trustee under the First Mortgage of the Wabash Railroad Company, dated May 1, 1889, and T. J. Moss Tie Company, have and recover against Peter J. Carpenter the sum of Twenty Dollars for their costs herein and have execution therefor.

May 13, 1939.

# United States Circuit Court of Appeals,

EIGHTH CIRCUIT.

MAY TERM, 1939.

PETER J. CARPENTER, Appellant,
vs.
WABASH RAILWAY COMPANY et al., Appellees.
No. 11,354.

Appeal from the District Court of the United States for the Eastern District of Missouri.

## APPELLANT'S MOTION FOR REHEARING.

Now comes the appellant, Peter J. Carpenter, and files this, his petition for rehearing, and respectfully moves and petitions this Honorable Court to grant him a rehearing herein, and for grounds of such petition states that this Court, in its opinion, rendered and filed on the 13th day of May, 1939, has inadvertently overlooked material matters of law and fact in the respects and particulars hereinafter mentioned. (The petition which the appellant sought, and the District Court denied him leave, to file is,

FILE COPY

FILED
JUL 26 1939
CHARLES ELMORE CROPLEY
CLERK

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, and THE CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee.

T. J. MOSS TIE COMPANY,

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT,

## AND

## BRIEF IN SUPPORT THEREOF.

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ROBERTS P. ELAM,
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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.*

Now comes Peter J. Carpenter, petitioner, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, and to remove therefrom to this Court, for review, the record in the case lately pending in said Circuit Court of Appeals styled Peter J. Carpenter, Appellant, vs. Wabash Railway Company et al, Appellees, being cause No. 11,354, in equity, on the docket of said Circuit Court of Appeals. The duly certified record, including all

the proceedings in the District Court of the United States for the Eastern District of Missouri, where said cause was heard, and in the said Circuit Court of Appeals, to which an appeal was taken by petitioner from the judgment of the trial court, is filed herewith under separate cover.

Your petitioner represents that he is aggrieved by the decision and judgment of said Circuit Court of Appeals in said cause wherein said Circuit Court of Appeals on May 18, 1939, affirmed the judgment of the trial court, and on June 12, 1939, thereafter denied this petitioner's petition for a rehearing of said cause.

Your petitioner states that the matters of issue in said cause are of peculiar gravity and great general importance, in that the following are the principal questions presented:

## Questions Presented.

1. Whether, in an equity receivership proceeding for the reorganization of a railroad, personal injury claims of railroad employes should not receive treatment equal to that as such claims would receive, as prescribed by Congress, in a proceeding for the reorganization of a railroad under Section 77 of the Bankruptcy Act, and, accordingly, be preferred and paid as operating expenses.

2. Whether railroad employes' personal injury claims are not entitled to be preferred and paid as operating expenses in an equity receivership proceeding for the reorganization of the railroad.

3. Whether a federal court, taking jurisdiction of a railroad's property in an equity receivership proceeding, is not bound to respect an existing judgment lien, created by the statutes of the state in which the judgment was recovered against the railroad, and in which state property of the railroad is situated.

4. Whether, where an equity receivership, involving the reorganization of a railroad, is in process, and there has been no order of foreclosure or distribution of assets, a failure to file exceptions to a Special Master's report, which has not been confirmed, estops a creditor from being heard upon a question of the correctness of the conclusions of law reached by such Master upon undisputed facts.

5. Whether a creditor, irrespective of the classification or priority of his claim, has a right to file, and be heard upon, a petition to discharge receivers upon the alleged grounds of their unfitness, neglect of duty, and business affiliation with the interests which brought about the insolvency and resulting receivership of the debtor.

6. Whether due observance of the spirit and purpose of the provisions of Section 77 of the Bankruptcy Act (providing that there be appointed a disinterested trustee for a railroad being reorganized under such section) requires that a federal court refuse to continue in office as the two receivers of a railroad, being reorganized in an equity receivership proceeding, one of such receivers being a major officer of such railroad, and the other being a major representative of a corporation which holds stock control of such railroad.

7. Whether a creditor has the right to file and be heard upon a petition to terminate a receivership which commenced on December 1, 1931, and is still continuing, and which is, in substance, alleged to have become a "nursing" receivership.

## Summary Statement of Matter Involved.

On February 13, 1931, petitioner recovered in the Circuit Court of the City of St. Louis, Missouri, a judgment against the Wabash Railway Company for injuries sustained on February 15, 1929, in the course of his employment as an

employe of said company, which judgment was affirmed by the Supreme Court of Missouri, in the sum of $10,000.00, and the judgment stands as of said February 13, 1931, in said amount (R. 51-52, 78-79, 105-106, 114; 103 F. [2d], l. c. 997).

On and since the date of petitioner's said judgment, the Wabash Railway Company owned, and owns, real estate in the City of St. Louis, Missouri, having a value of more than $800,000.00 (R. 52, 126). Under the provisions of Sections 1104-1105 of the Revised Statutes of Missouri 1929, said judgment became, on the said date thereof, a lien upon said real estate.

On December 1, 1931, T. J. Moss Tie Company, a general creditor, filed in the United States District Court for the Eastern District of Missouri, its bill of complaint against the Wabash Railway Company, alleging the Wabash to be insolvent and unable to pay its debts and praying the appointment of receivers (R. 2-14). On that same day the Wabash filed its answer admitting the allegations of the bill and joining in the application for the appointment of receivers (R. 14-16), and the Court thereupon, on said date, entered an order appointing Walter S. Franklin and Frank C. Nicodemus, Jr., the Wabash president and assistant general counsel, respectively, as Receivers of said Wabash (R. 16-21, 53). Also, on said day, said District Court appointed as general counsel for the said Receivers, one Nat S. Brown, who was, at said time, vice-president and general solicitor of the Wabash (R. 21-22, 16).

Thereafter, on March 19, 1932, said District Court appointed a Special Master to hear claims of Wabash creditors (R. 22-23).

Thereafter, on April 7, 1932, said District Court made an order for the filing with, and hearing by, the Master of claims of creditors of the Wabash (R. 23-25). No provi-

sion was made in such order relative to the form or contents of proofs of claim.

Thereafter, and within the time fixed by said order, petitioner filed with the Special Master his claim on his said judgment which was then pending on appeal in the Supreme Court of Missouri (R. 102, 106-107).

Thereafter, on August 31, 1932, the Wabash Receivers filed with the Special Master their answer to petitioner's said claim, admitting that judgment was rendered in favor of petitioner, as claimed by him, denying that the claim was entitled to any preference or priority, and praying that, if petitioner's claim be allowed, it be not classified as to be entitled to any priority or preference (R. 109).

On August 26, 1935, and on January 6, 1936, a hearing was had before said Special Master upon petitioner's claim (R. 102-105). Thereafter, on March 7, 1936, the Special Master filed in said District Court his partial report covering, among other things, petitioner's said claim, and reporting that petitioner's claim should be allowed in the aggregate sum of $10,587.15 as a general unsecured claim and without any lien or priority (R. 34-37). Petitioner had no notice of the filing of such report until about the time he applied for leave to file, in the said District Court, his hereinafter mentioned petition (R. 62). At the time petitioner sought to file in the said District Court his hereinafter mentioned petition, said report of the Master had not been approved or affirmed by said District Court (R. 62).

On March 1, 1937, and November 1, 1937, respectively, the trustees, under two mortgages, filed their respective bills of complaint against the Wabash for mortgage foreclosures and other judgments incident thereto. Both of these proceedings were consolidated with the original receivership proceeding against the Wabash; the Receivers

appointed in said original cause were continued as Receivers in said consolidated cause; and said consolidated cause was, and is being, carried on in said District Court as consolidated cause in equity, No. 12,099 (R. 37-44, 66-67, 80-81, 114-115).

On October 8, 1933, the said Walter S. Franklin having resigned as such Receiver to become vice-president of the Pennsylvania Railroad Company (R. 32), the said District Court appointed, as his successor, one Norman B. Pitcairn, president of another railroad subsidiary of the Pennsylvania Railroad Company (R. 33-34, 52).

At all times aforementioned, the Pennsylvania Railway Company owned, and owns, stock control of the Wabash (R. 53).

On January 26, 1938, petitioner filed in the said District Court, and in said consolidated cause, an application for leave to file therein a petition in the form to said application attached, and seeking, among other things, the discharge of said Receivers and the termination of the receivership (R. 47-77). Said petition alleged, in substance, the matters hereinbefore referred to, and further alleged, among other things:

Kuhn, Loeb & Company, an investment banking corporation, is, and for many years has been, the banker for the Pennsylvania Railroad Company; that it also had and exercised control of the Wabash and its financial policies and investments in 1926; that the Pennsylvania Railroad Company conspired and connived with Kuhn, Loeb & Company in a course of conduct whereby the Wabash was caused to, and did, purchase and acquire Lehigh Valley Railroad Company stock; that such stock purchases were made without the knowledge or approval of the Interstate Commerce Commission, and that the making of such purchases was concealed from the Interstate Commerce Com-

mission, by the making of false reports, and by the falsification of the books and records of the Wabash; that Kuhn, Loeb & Company collected and received fees, commissions and profits in excess of $1,000,000, and sold to the Wabash Company, at great profit to itself, stocks owned by Kuhn, Loeb & Company; that the foregoing was accomplished by a conspiracy between Kuhn, Loeb & Company and officers and directors of the Wabash, thus alleged to be controlled by the Kuhn, Loeb & Company, and the Pennsylvania Railroad Company; that the losses accruing to the Wabash Railway Company by said transactions were in excess of $20,000,000; that, although such transactions, course of conduct, and the losses sustained by the Wabash Company, as the result thereof, had, through a congressional investigation, been made generally known to the public, the Wabash Receivers had taken no action to recover moneys lost by the Wabash thereby; that by reason of their failure to take any such action, and because of their aforesaid relationship with the Pennsylvania Railroad Company, the said Receivers are improper persons to act as Receivers of the Wabash, and that their continuance in office, as said Receivers, is in conflict with the spirit and provisions of Section 77 of the Bankruptcy Act, enacted by Congress as a means of curbing abuses of friendly railroad receiverships, and requiring the appointment of a disinterested trustee; that the Pennsylvania has so improperly exercised its control of Wabash as to cause Wabash to suffer great losses and wasting of its assets; that the same interests which caused Wabash to sustain said losses through the mentioned transactions and course of conduct, and "which interests include Kuhn, Loeb & Company, the Pennsylvania Railroad Company, their nominees, and persons under their control," are still in control of matters pertaining to securities of Wabash Railway Company, and have obtained and possessed, and are under-

taking to exercise such powers as will permit them to direct the course of, and policies relating to, any reorganization of Wabash Railway Company; and that "it is only by such remedial legislation, and supervision and exercise of powers of the Interstate Commerce Commission, as are provided for in Section 77 of the National Bankruptcy Act, that a proper accounting on behalf of Wabash Railway and the protection of the creditors of Wabash Railway Company can be had"; that under the circumstances existing, the receivership should be terminated, so that thereby there might result the institution of a proceeding for the reorganization of the Wabash, under the provisions of said Section 77 of the Bankruptcy Act; that since the commencement of the receivership there have been practically no proceedings of a constructive nature looking to a final disposition of the action, and the termination of the receivership; that the receivership has become a "nursing" receivership; that the claim of petitioner is one entitled to priority over the liens of the mortgages, and is entitled to present payment as an operating expense.

The District Court denied petitioner's leave to file said petition, and, in so doing, ruled and held: that petitioner was but a general creditor; that his petition did not conform to the requirements of former Equity Rule No. 37; that petitioner's claim was an unsecured claim without lien or priority, and had correctly been so determined by the Special Master; that petitioner was estopped from asserting a claim for priority or preference (evidently because of petitioner's failure to except to the said report of the Special Master); that said petition stated no cause of action in equity; and that the granting of leave to file said petition would encumber and delay "the orderly process of these cases toward a reorganization of the properties of the defendant Railway Company" (R. 78-84). Thereupon, petitioner duly took an appeal to the United

States Circuit Court of Appeals for the Eighth Circuit (R. 77-78, 84-99).

On May 13, 1939, after due submission, the United States Circuit Court of Appeals for the Eighth Circuit rendered its opinion and judgment upon petitioner's said appeal (R. 113-124), affirming the said judgment and decision of the said District Court. In its said opinion, so affirming said judgment and decision of said District Court, the said Circuit Court of Appeals held: "By subsection (n) of Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., par. 205 [n]), claims for personal injuries to employees of a railroad corporation are entitled to priority. * * * But this subsection applies expressly to proceedings in bankruptcy, and * * * this is an equity receivership" (R. 120; 103 F. [2d], l. c. 1000); that, in an equity receivership proceeding for the reorganization of a railroad, personal injury claims of employees are general unsecured claims, without priority, and not entitled to payment as operating expenses; that the District Court had correctly decided that petitioner's said claim and judgment was a general unsecured claim and not entitled to any lien, priority or preference in payment; that petitioner, having failed to file exceptions to the said report of the Special Master, was estopped from asserting preference and priority of payment of his claim; and that the District Court had, and properly exercised, discretion to deny petitioner's application for leave to file his said petition in said consolidated cause.

Thereafter, on May 27, 1939, petitioner duly filed his petition for a rehearing in said cause in said Circuit Court of Appeals (R. 125-135) and said petition for rehearing was denied on the 12th day of June, 1939 (R. 137).

**Reasons Relied on for Allowance of Writ.**

I.

(A) Since Congress has prescribed that in railroad organization proceedings under Section 77 of the Bankruptcy Act employees' personal injury claims shall be preferred and paid as operating expenses, the decision of the Circuit Court of Appeals for the Eighth Circuit that, in an equity receivership proceeding for the reorganization of a railroad, such rule does not obtain, and that claims of employees for personal injuries are but general claims, presents an important question of federal law which has not been, but should be, settled by this Court.

(B) The decision of the Circuit Court of Appeals for the Eighth Circuit, that in an equity receivership proceeding an employee's judgment for personal injuries is but a general claim, is in conflict with the decision on the same question, of the Circuit Court of Appeals for the Fourth Circuit in the case of:

Bowen v. Hockley et al., 71 F. (2d) 781, 784-786.

II.

The decision of the Circuit Court of Appeals for the Eighth Circuit, to the effect that petitioner's failure to except to the report of the Special Master, appointed to hear claims, estops petitioner from being heard upon a question of correctness of the conclusions of law reached by the Master upon undisputed facts, is in conflict with the decisions of:

(A) The Circuit Court of Appeals for the Sixth Circuit in the case of Holman v. Cross, 75 F. (2d) 909, 913;

(B) The Circuit Court of Appeals for the Fifth

Circuit in the case of Lone Star Gas Company v. City of Fort Worth, 93 F. (2d) 584, 585;

(C) The Circuit Court of Appeals for the Second Circuit in the case of Childs v. County Trust Company of New York, 70 F. (2d) 1012 (affirming 6 F. Supp. 821), and

(D) The Circuit Court of Appeals for the Second Circuit in the cases of Employers' Liability Assurance Corporation v. Astoria Mahogany Company, 6 F. (2d) 945, 946, and People etc. v. Hopkins et al., 18 F. (2d) 731, 732, 733.

III.

The decision of the Circuit Court of Appeals for the Eighth Circuit to the effect that the District Court had discretion to refuse to permit a creditor to file and be heard upon a petition to terminate a railroad receivership which was commenced in such District Court on December 1, 1931, and is, in substance, alleged in such petition to have become a "nursing" receivership, is in conflict with the applicable decisions of this Court in:

In re Metropolitan Railway Receivership, 208 U. S. 90, 112;

Milwaukee and Minnesota Railroad Company et al. v. Soutter etc., 69 U. S. 510, 524.

IV.

(A) The decision of the Circuit Court of Appeals for the Eighth Circuit to the effect that a district court has discretion to refuse to permit a general creditor to file and be heard upon a petition praying the discharge of receivers upon the alleged grounds of their unfitness and neglect of duty presents an important question of federal law which has not been, but should be, settled by this Court. The curbing of friendly receivership abuses is of

great importance to the public generally, and the accomplishment thereof will be greatly impaired if any creditor, irrespective of rank, may be denied the right to move the discharge of receivers who are unfit, neglectful and not disinterested.

(B) Since Congress, in an effort to curb abuses of friendly receiverships has provided in Section 77 of the Bankruptcy Act for the appointment of a trustee not associated with a debtor railroad, or any holding company, connected therewith, it is of great importance to the public generally that this Court decide (as it has not yet done) whether a due observance of the spirit and purpose of such legislation does not require that a federal court of equity refuse to continue in office as the two receivers of a railroad being reorganized in an equity receivership one who is a major officer of such railroad, and one who is a major representative of a parent corporation, holding stock control of such railroad.

**Prayer.**

For the purpose of correcting the errors complained of and to the end that the rights of the petitioner may be determined in accordance with the law, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding it to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the records and proceedings of the said Circuit Court of Appeals in the within described cause of Peter J. Carpenter, appellant, v. Wabash Railway Company et al., appellees, No. 11,354, in equity, to the end that the judgment of said Circuit Court of Appeals in said cause may be reviewed by this Court as provided by law, and that your petitioner

may have such other relief as to this Court may seem appropriate, and that the judgment of the said Circuit Court of Appeals may be reviewed by this Honorable Court.

PETER J. CARPENTER, Petitioner,

By MARK D. EAGLETON,
HYMAN G. STEIN,
ROBERTS P. ELAM,
Counsel for Petitioner.

## SUPPORTING BRIEF.

### I.

### Opinions of the Courts Below.

The opinion and decree of the said District Court appears at pages 78-83, inclusive, of the transcript of the record filed herewith, and it is not reported.

The opinion of the said Circuit Court of Appeals (R. 113-123) is reported in 103 F. (2d) 996.

### II.

### Jurisdiction of This Court.

1.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

2.

The following decisions sustain the jurisdiction of this Court to review the decision of the Circuit Court of Appeals for the reasons set out in the specifications of error:

Warner v. New Orleans, 167 U. S. 467;
The Anasoldo San Georgio I. v. Rheinstrom Brothers, 294 U. S. 494;
Ivanhoe Building & Loan Association of Newark v. Orr, 295 U. S. 243;
Erie Railroad Company v. Tompkins, 302 U. S. 671.

### III.

The original date of the judgment of said Circuit Court of Appeals, here sought to be reviewed, is May 13, 1939

(R. 113). Petitioner's petition for rehearing was duly filed in said Circuit Court of Appeals on May 27, 1939 (R. 135), and was overruled on June 12, 1939 (R. 137). A thirty days' stay of mandate was granted on June 27, 1939 (R. 138).

## IV.

## Statement.

A full statement of the case has been made in the petition for writ of certiorari, and, in the interest of brevity the statement is not here repeated.

## V.

## Specifications of Error.

### A.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that petitioner's judgment against Wabash Railway Company, recovered by petitio in the Circuit Court of the City of St. Louis, Missouri, on February 13, 1931, is a general claim, and not entitled to any lien or priority.

### B.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that petitioner's said judgment is not entitled to present payment by the Receivers of Wabash Railway Company, as an operating expense.

### C.

The Circuit Court of Appeals for the Eighth Circuit erred in failing to decide and adjudge that the Receivers of Wabash Railway Company acquired, and hold, posses-

sion of the real estate of said company, situate in the City of St. Louis, Missouri, subject to the lien which is prescribed and accorded to petitioner's said judgment by Sections 1104 and 1105, Revised Statutes of Missouri 1929, and in failing to give effect to said lien.

D.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that petitioner's failure to except to the report of the Special Master, appointed by the District Court to hear claims, estops petitioner from being heard upon a question of the correctness of the conclusions of law of the Master upon undisputed facts.

E.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that the District Court had, and properly exercised, discretion to deny petitioner leave to file and be heard upon a petition for the discharge of the Receivers of Wabash Railway Company upon the alleged grounds of their unfitness and neglect of duty.

F.

The Circuit Court of Appeals for the Eighth Circuit erred in that said Court, in effect, decided and adjudged that the District Court had and properly exercised a discretion to continue in office as the Receivers of Wabash Railway Company, one who is a major executive of said company, and another, who, at the time of his appointment, was a major representative of a corporation holding stock control of said Wabash Railway Company, notwithstanding the enactment by Congress, during said receivership, of the provisions in Section 77 of the Bankruptcy Act to the effect that, in proceedings under such section for

the reorganization of a railroad, the Court shall appoint a disinterested trustee.

G.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that the District Court had, and properly exercised, discretion to refuse to permit petitioner to file and be heard upon a petition to terminate the receivership of Wabash Railway Company, which commenced on December 1, 1931, for the alleged reason that the same had become a "nursing" receivership.

H.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that the District Court had, and properly exercised, a discretion to deny petitioner leave to file the petition which, on January 26, 1938, he presented and applied to said District Court for leave to file in said receivership proceeding.

VI.

**Argument.**

POINT I.

(Assignment of Errors A and B.)

Undoubtedly it was through a recognition of the fact that employees' claims for personal injuries bear a direct relationship to the operation of a railroad, and arise out of services through which a railroad is maintained as a going concern, and without which service and operation its property and the liens of mortgages thereon would become worthless, that Congress was prompted to and did provide by Section 77 of the Bankruptcy Act, that, in pro-

ceedings thereunder for the reorganization of a railroad, employees' personal injury claims shall be preferred, and paid as operating expenses. The decision of the Circuit Court of Appeals that such rule does not obtain when a railroad is being reorganized through means of a receivership action, operates to make a railroad employee's ability to secure the protection which Congress has recognized he is entitled to receive dependent, not upon those humane principles and concepts of justice which prompted such legislation, but, rather, upon the **nature of the proceeding** which those in control of a railroad, or its securities, elect as the means of effecting a reorganization. The injustice of such holding is even more marked by the fact that, as to the choice of form of a reorganization proceeding, an injured employee obviously has no voice.

The situation presented is that, if the insolvent Wabash Railroad was being reorganized under Section 77 of the Bankruptcy Act, the petitioner's claim for personal injuries, sustained through his contribution to the maintenance and operation of the Wabash, would be entitled to present payment in full (see 11 U. S. C. A., Sec. 205 [n]); but, under the decision of the courts below, because the Wabash reorganization proceeding is in the nature of an equity receivership, the petitioner's claim is practically worthless.*

This Court, through its familiarity with matters of common knowledge, judicially knows that there are other railroads being reorganized under Section 77 of the Bankruptcy Act, in the federal courts within the territorial jurisdiction of the District Court below, and that, therefore, such railroads' employees' personal injury claims have been paid in full (Cf. Central Hanover Bank & Trust

* The record shows that the Wabash is hopelessly insolvent, and if petitioner is but a general creditor, then he can, at best, be expected to receive, at some uncertain date, some form of securities, the worth of which is doubtful.

Co. v. Williams [C. C. A. 8], 95 F. [2d] 210). Here, however, the courts below hold that the same kind of a claim, must, by the same courts, be adjudged to be a general unsecured claim; and this, in effect, because those in control of the situation have seen fit to continue to seek a reorganization through a "friendly" receivership proceeding, rather than through a proceeding under said Section 77 of the Bankruptcy Act.

Petitioner respectfully submits that, just as uniformity of decisions of the federal courts on federal questions is of the utmost importance in the administration of justice, and that the rights of parties should be determined according to a uniform law of the land, and not according to the locality of the district in which a cause is tried, so is it equally true that the right of this petitioner, as an injured employee, should be protected in accordance with the principles laid down by Congress, and not determined by the **nature of the proceeding** in which a federal court has ordered him to file his claim.

Whether a federal court of equity should be permitted to use its power to operate a railroad, without regard to the priority which Congress has recognized that employees' personal injury claims should receive, is a matter of great general importance, and should be determined by this Court.

If, as the court below has ruled, the preference accorded railroad employees' personal injury claims, in proceedings under said Section 77 (n) of the Bankruptcy Act (11 U. S. C. A., Sec. 205 [n]), are not to obtain in an equity receivership proceeding for the reorganization of a railroad, what happens to the ancient and undisputed rule that "equity follows the law"? Here we have a situation in which the law-making body of the United States has accorded to railroad injured employees preferential rights in a railroad reorganization conducted through a **statutory** pro-

ceeding. Is not equity obligated to follow such law when it undertakes to classify and determine the priorities of such a claim in an equity proceeding?

But, independent of the said provisions of Section 77 of the Bankruptcy Act, there are other reasons why this Court should review the decision of the court below that a railroad employee's personal injury claim is but a general claim, and not entitled to any preference or priority in payment.

The conflict of the decision of the court below with the applicable decision of the Circuit Court of Appeals for the Fourth Circuit, in the case of Bowen v. Hockley et al., 71 F. (2d) 781, as well as the true principles of equity in the premises, readily appear from the following excerpts from the opinion of the Circuit Court of Appeals for the Fourth Circuit, in said case of Bowen v. Hockley, 71 F. (2d), l. c. 783-786:

> "• • • Uninjured laborers contribute by their labor to the operation of the business and are paid on the basis of that contribution. The employee who is injured or killed has made his contribution, • • •; and in equity and good conscience the compensation award should be held a charge on the income of the business, just as is the wage of the laborer • • •.
>
> "The principle of equity applicable is that he who seeks equity must do equity. Creditors and lien claimants need not seek the aid of equity in enforcing debts and liens. When they ask a court of equity to grant the extraordinary relief of protecting a private corporation's business from the legal process of its creditors and to operate it under order of court so as to preserve its going concern value for their benefit, they should be willing that the claims of those who have helped to give it value as a going concern and whose claims have been imposed upon it by law as a fixed expense should be paid from the income derived from its continued operation" (71 F. [2d], l. c. 783).

"For the court not to require its receiver to make the compensation payments which the state law requires of the owner of the business, would place it in the position of using its power to preserve the business for stockholders and creditors, without regard to the most helpless class of those having claims against the business itself" (71 F. [2d], l. c. 785).

"The fact that the statute does not provide for the protection of those receiving compensation payments and that no decision has dealt with their rights in the absence of statute, is no reason why a court of equity in undertaking the operation of the business should not safeguard their rights. One of the glories of equity jurisprudence is that it is not bound by the strict rules of the common law, but can mold its decrees to do justice amid all the vicissitudes and intricacies of life. The principles upon which it proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations" (71 F. [2d], l. c. 786).

"Surely a court of equity, which has found means in receivership proceedings to protect the claim of the coal company which has furnished coal, the steel company which has furnished rails, and the workmen who has furnished labor prior to the receivership, is not powerless to protect the rights of the injured employee in the business which he has helped to build" * * * (71 F. [2d], l. c. 786).

In Bowen v. Hockley et al., supra, the claim had been liquidated by an award by the Workmen's Compensation Commission. In the case at bar, petitioner's claim for injuries sustained by him as an employee, was liquidated by the judgment of a court. Both claims arose out of the contribution, by an employee, to the operation of his employer's business. Whether the tribunal determining the responsibility of the employer, and the amount of the claim, be a commission or a court, and whether the claim,

as liquidated, be denominated an "award" or a "judgment," is, of a certainty, immaterial.

The court below, has, in substance, and in direct conflict with said decision of the Circuit Court of Appeals for the Fourth Circuit, held that an employee's personal injury claim is but a general claim, and that a court of equity, while operating a business through its receivers, should not require the receivers to pay an injured employee a claim for which he has recovered a judgment, and which judgment he would be entitled and able to collect, in the abence of the Court's possession and operation of the property and business through its receivers.

It may be said, however (as mentioned in the decision of the court below), the weight of authority in federal courts has long been that employees' claims for personal injuries are but general claims. But this is sufficiently answered by the language in Bowen v. Hockley, supra, that:

> "The principles upon which it (equity jurisprudence) proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations" (71 F. [2d], l. c. 786).

By said provisions of Subsection (n) of Section 77 of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)] Congress has recognized the necessity and justice of preferring, and paying as operating expenses, the personal injury claims of railroad employees. Can it be reasonably contended that a court of equity, in its consideration of claims of this character, should be any less just and reasonable, or less conscious of changing views, than Congress?

It is significant to note that the Interstate Commerce Commission, by an order effective June 1, 1914, prescribing a classification of operating revenues and operating expenses for the use of carriers by rail, in keeping of their

revenue and operating expense accounts, required that all damages and costs adjudged against a railroad company in favor of employees for personal injuries should be classified as operating expenses (R. 66).

With reference to such order the Supreme Court of Indiana, in the case of McCullough v. Union Traction Co., 206 Ind. 585, 607 et seq., 186 N. E. 300, 308 et seq., said:

> "We cannot agree to the proposition that the rules prescribed by the Interstate Commerce Commission is merely a bookkeeping method." * * *
>
> "The contention that the regulations prescribed by the Interstate Commerce Commission is merely a bookkeeping method is untenable. If the contention is true, then the system is absolutely meaningless and without substance."*

In said case of McCullough v. Union Traction Co. of Indiana, 206 Ind. 585, 598-604, 186 N. E. 300, 305-307, the Court said:

> "If such claims are operating expenses of a railroad when operated by a receiver why are they not operating expenses before a receiver has been appointed?"
>
> "* * * In the operation of railroads, accidents, and injuries to persons and property, are unavoidable, and the payment and settlement of such claims must necessarily be considered as operating expense." * * *
>
> "* * * So, in the instant case, the mortgagees for years had intrusted the property covered by the mortgage to the mortgagor for his complete control and management. They knew that in the natural course of events damage to property, and injury to persons would be done by the negligence of the servants of the mortgagor in the operation and management of the Traction Company. They knew when they took their

* The Wabash is an Indiana corporation, and a large part of its railway system is located in Indiana (R. 65-66).

mortgage that railroads cannot be operated, and managed over a long period of time, without damage to property, and injuries to persons. They also knew that it is the law of the land, that those damaged, and injured through the negligence of the railroad would be entitled to recover their damage whatever it may have been. And knowing all of these facts is it not sound reason to say that they took the mortgages with knowledge of the fact that the operating expenses of the road must be paid? And it must be conceded that such claims are considered operating expenses."

## Point II.

### (Assignment of Error C.)

In holding that petitioner's judgment is but a general claim, the court below, has, in effect, failed to respect a lien which petitioner had acquired, under the statutes of Missouri, prior to the appointment of receivers of the Wabash, and which lien was in full force and effect at the time of their appointment. Further, in so holding, the court below has decided an important question of local law in a way which, as hereinafter more fully appears, is in conflict with an applicable decision of the Supreme Court of Missouri, and also with the weight of authority.

Petitioner's judgment was recovered in the Circuit Court of the City of St. Louis on, and stands as of, February 13, 1931 (R. 51-52, 114). The District Court appointed receivers for the Wabash on December 1, 1931 (R. 16-21).

On the date petitioner recovered his judgment, the Wabash owned, and still owns, real estate in the City of St. Louis, Missouri, having a value of more than $800,000.00 (R. 52).

Section 1104, Revised Statutes of Missouri 1929, provides:

"Judgments and decrees rendered by any court of

record shall be a lien on the real estate of the person against whom they are rendered, situate in the County for which the Court is held."

Section 1105, Revised Statutes of Missouri 1929, provides:

"The lien of a judgment or decree shall extend as well to the real estate acquired after the rendition thereof, as to that which was owned when the judgment or decree was rendered. **Such liens shall commence on the day of the rendition of the judgment**, and shall continue for three years, subject to be revived as hereinafter provided; but when two or more judgments or decrees are rendered at the same term, as between the parties entitled to such judgments or decrees, the lien shall commence on the last day of the term at which they are rendered." (Emphasis ours.)

In LaGrange Butter Tub Co. v. National Bank of Commerce, 122 Mo. 154, 159-160, 26 S. W. 710, 711, the Court said:

"After the aid of a court of equity has been invoked * * * ordinarily, no creditor can pursue a legal remedy, at least, in such way as to obtain for himself a preference. But **the Court of equity is bound to respect legal rights and preferences already acquired**, and to make distribution accordingly." (Emphasis ours.)

In 34 Corpus Juris 631 it is stated:

"The lien of a judgment is not lost or affected by the appointment of a receiver for the judgment debtor and his taking possession of the property affected * * *."

In Clark on Receivers, Vol. 1, Sec. 541 (C), page 736, it is said:

"A judgment creditor having such judgment lien

at the time a receiver is appointed has a lien which cannot be voided by the appointment of a receiver. Such lien must be protected by the court appointing the receiver, and distribution will be made subject to such lien."

POINT III.

(Assignment of Error D.)

The court below, has, in effect, decided that petitioner's failure to except to the report of the Special Master, appointed by the District Court to hear claims, estops petitioner from being heard upon a question of the correctness of the conclusions of law reached by the Master upon undisputed facts. Such decision is in conflict with the applicable decisions of the Courts of Appeals for other circuits. (It will be borne in mind that the Special Master's said report had not been confirmed and petitioner alleged that he had but recently learned of its having been filed [R. 62].)

In Employers' Liability Assurance Corporation v. Astorja Mahogany Company, 6 F. (2d) 945, 946 (C. C. A. 2), the Court said:

"Orders of foreclosure are primarily intended for no more than safety in distribution. * * * They enable the receivers to dispose of the property, but not to forfeit the rights even of dilatory creditors."

In Holman v. Cross, 75 F. (2d) 909, 913 (C. C. A. 6), the Court said:

"It is to be noted that, with respect to the defendants who did not except, the Court confirmed the Master's report upon the facts, but noticed such legal conclusions as found no support therefrom under the rule of Smith v. Seibel et al. (D. C.), 258 F. 454. This course we approve."

In Lone Star Gas Company v. City of Fort Worth, 93 F. (2d) 584, 585 (C. C. A. 5), the Court said:

> "The Master's report is not unassailable as is argued. The reference does not appear to have been by consent of both parties to an agreed Master, but if it had been it would, under the new Equity Rule 61½, 28 U. S. C. A., following section 723, be only advisory. The District Judge appears to have felt himself overmuch bound by it."

**Conclusion.**

Being desirous of not burdening the Court with an unduly lengthy argument, and having called the Court's attention specifically to the questions involved, and to the reasons that exist for the issuance of the writ of certiorari, we will not argue the remaining errors hereinabove alleged and assigned.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing the said decision.

Respectfully submitted,

By MARK D. EAGLETON,
HYMAN G. STEIN,
ROBERTS P. ELAM,
Counsel for Petitioner.

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, THE CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY.

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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# SUPREME COURT OF THE UNITED STATES.

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## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### Applicable Law Enacted by Congress Pending Determination of this Application for Writ of Certiorari.

Subsequent to petitioner's filing his application herein for writ of certiorari, a law applicable to one or more of the vital questions presented has been enacted by an Act of Congress.

By an act approved August 11, 1939,* amendatory of Section 77 (n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)], the Congress added:

> "* * * equity receiverships of railroad corporations now or hereafter pending in any court of the United States,"

as a further type of proceeding in which

> "* * * claims for personal injuries to employees of a railroad corporation * * * shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad."

The Circuit Court of Appeals for the Eighth Circuit held, in the proceeding here sought to be reviewed, that petitioner's claim, although a claim against a railroad corporation in equity receivership in a federal court for personal injuries to an employee of such railroad corporation, was but a general unsecured claim, and entitled to no lien or priority (R. 119-121) (103 F. [2d], l. c. 1000), and further ruled that Section 77 (n) of the Bankruptcy Act, as it then existed, giving priority to railway employees' personal injury claims "* * * applies expressly to proceedings in bankruptcy, and * * * this is an equity receivership," so that petitioner's claim was not entitled to the priority given by said section 77 (n).

The situation now presented is that, pending the determination by the Honorable Court of petitioner's petition for writ of certiorari, a law applicable to vital questions involved has been enacted, and the case should now be decided according to the law as it now exists.

The following rule was announced by Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch. 103, 109:

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*The act approved August 11, 1939, is set out in full in the appendix hereto, together with Section 77 (n) of the Bankruptcy Act as amended thereby.

> "It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

The first part of the above pronouncement of Chief Justice Marshall was later quoted with approval by this Court in *Dinsmore v. Southern Express Company et al.*, 183 U. S. 115, 120.

Likewise, in *Texas Company v. Brown*, 258 U. S. 466, 474, this Court, in discussing the effect of a law enacted after a judgment rendered below, and pending hearing on appeal, said:

> "Although passed after the decree below, this act must be given effect in deciding the appeal, * * *."

In *Home Savings & Loan Association v. Plass* (C. C. A. 9), 57 F. (2d) 117, the Court quoted with approval from Lewis' Sutherland Statutory Construction, 2nd Ed., Sec. 285, the following:

> "If there has been a change or alteration or repeal of the law applicable to the rights of the parties, after the rendition of judgment, and pending an appeal, the case must be heard and decided in the appellate court, according to the existing law."

It is petitioner's contention that the holding of the District Court and the Circuit Court of Appeals, as to the classification of petitioner's claim, was incorrect, and that the Act of Congress, approved August 11, 1939, is but declaratory of the equitable principles which were there-

tofore applicable to claims such as that of petitioner. However, even if the petitioner's contention be incorrect, and even if the District Court and the Circuit Court of Appeals were correct in deciding, under the law as it then existed, that petitioner's claim was but a general unsecured claim, entitled to no lien or priority, such determination and holding of those courts is incorrect under the now existing law enacted during the pendency of petitioner's petition for writ of certiorari herein, and the instant case should, we respectfully submit, be determined by this recent enactment which gives such claims a preferred status so as to be payable out of the assets of a railroad corporation in equity receivership as operating expenses of such railroad.

It is obvious that, in so changing and amending Section 77 (n) of the Bankruptcy Act, the Congress has undertaken to grant relief unto petitioner, and others similarly situated, from any inequitable classification of his and their claims, and any inequitable distinction between claims of an identical character in different types of proceedings involving the reorganization of a railroad.

To the end that such relief as the Congress intended may, by an appropriate ruling and judgment of this Honorable Court, be made promptly available unto petitioner, and others similarly situated, as well as for the reasons stated in his petition and brief heretofore filed herein, petitioner respectfully represents that his petition for writ of certiorari herein should be granted.

Respectfully submitted,

MARK D. EAGLETON,
HYMAN G. STEIN,
ROBERTS P. ELAM,
Counsel for Petitioner.

## APPENDIX.

The Act of Congress approved August 11, 1939, is in words and figures as follows:

"[Public—No. 386—76th Congress]

[Chapter 689—1st Session]

[S. 2654]

An Act

To amend subsection (n), section 77, of the Bankruptcy Act, as amended, concerning payment of preferred claims.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first sentence of section 77, subsection (n), of the Bankruptcy Act, as amended, be further amended to read as follows:

"'In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustees appointed pursuant to this section, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad.'

"Approved, August 11, 1939."

Section 77 (n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)], as amended by the foregoing act approved August 11, 1939, is as follows (italicized portion added by the act approved August 11, 1939):

> "In proceedings under this section, *and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States*, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustee appointed pursuant to this section, shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad. No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act, as amended June 21, 1934, or as it may be hereafter amended. No reorganization effected under this Act and no order of the Court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title."

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

## BRIEF OF PETER J. CARPENTER, PETITIONER.

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# SUPREME COURT OF THE UNITED STATES.

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No. 230.

PETER J. CARPENTER, Petitioner,

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WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, THE CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

## BRIEF OF PETER J. CARPENTER, PETITIONER.

This case is here pending upon writ of certiorari, awarded by this Court on the 9th day of October, 1939, to review a final judgment and opinion of the United States Circuit Court of Appeals for the Eighth Circuit, in so far as such judgment and opinion concerns the question of petitioner's right to intervene in the hereinafter mentioned consolidated cause, being the receivership of Wabash Railway Company, pending in the United States District Court for the Eastern District of Missouri, the purpose of which intervention is to enable the petitioner

to assert the priority of his claim and judgment against Wabash Railway Company for personal injuries sustained by him as and while an employee of said company.

The original date of the judgment of said Circuit Court of Appeals, here sought to be reviewed, is May 13, 1939 (R. 113). Petitioner's petition for rehearing was duly filed in said Circuit Court of Appeals on May 27, 1939 (R. 135), and was overruled on June 12, 1939 (R. 137). A thirty days' stay of mandate was granted on June 27, 1939 (R. 138). The petition for writ of certiorari was filed in this court on July 26, 1939.

## I.

## OPINIONS OF THE COURTS BELOW.

The opinion and decree of the said District Court appears at pages 78-83, inclusive, of the transcript of the record filed herewith, and it is not reported.

The opinion of the said Circuit Court of Appeals (R. 113-123) is reported in 103 F. (2d) 996.

## II.

## JURISDICTION OF THIS COURT.

### 1.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A. Sec. 347), to review by certiorari (heretofore granted by this Court) a final judgment and decision of the United States Circuit Court of Appeals for the Eighth Circuit.

### 2.

The following decisions sustain the jurisdiction of this Court to review the decision of the said Circuit Court of

Appeals for the reasons set out in the specifications of error:

Warner v. New Orleans, 167 U. S. 467;
The Anasoldo San Georgio I. v. Rheinstrom Brothers, 294 U. S. 494;
Ivanhoe Building & Loan Association of Newark v. Orr, 295 U. S. 243;
Erie Railroad Company v. Tompkins, 302 U. S. 671.

## III.

## STATEMENT OF THE CASE.

Prior to the commencement of the pending equity receivership of Wabash Railway Company the petitioner recovered a judgment against said company for personal injuries sustained by him as and while an employee of said company, and the petitioner now seeks to have said judgment declared to be preferred against and payable out of the assets of said company as an operating expense.

In support of his position, the petitioner relies not only upon the contentions presented in the courts below, but also upon the further fact that while his petition for certiorari was pending before this Court, the Congress passed an Act, approved August 11, 1939, amending Section 77 (n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)], in the manner following:

Prior to the passage of said amendatory Act, said Section 77 (n), so far as applicable to personal injury claims of employees, read as follows:

> "In proceedings under this section, claims for personal injuries to employees of a railroad corporation, * * * shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad."

By said amendment of August 11, 1939, said Section 77 (n) was made to include equity receiverships of railroad corporations now or hereafter pending in any court of the United States, so that the pertinent part of said section, as so amended, reads as follows (the words in italics being the amendment):

> "In proceedings under this section, *and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States*, claims for personal injuries to employees of a railroad corporation, * * * shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad."

On February 13, 1931, petitioner recovered in the Circuit Court of the City of St. Louis, Missouri, a judgment against the Wabash Railway Company (an interstate railroad), for personal injuries sustained on February 15, 1929, in the course of his employment as an employee of said company, which judgment was affirmed by the Supreme Court of Missouri in the sum of $10,000.00, and the judgment stands as of said February 13, 1931, in said amount [R. 51-52, 78-79, 105-106, 114, 103 F. (2d), l. c. 997].

On December 1, 1931, T. J. Moss Tie Company, a general creditor, filed in the United States District Court for the Eastern District of Missouri, its bill of complaint against the Wabash Railway Company, alleging the Wabash Railway Company to be insolvent and unable to pay its debts and praying the appointment of receivers (R. 2-14). On that same day the Wabash Railway Company filed its answer admitting the allegations of the bill and joining in the application for the appointment of receivers (R. 14-16), and the Court thereupon, on said date, entered an order appointing Walter S. Franklin and Frank C. Nicodemus, Jr., the Wabash president and assistant

general counsel, respectively, as Receivers of said Wabash Railway Company (R. 16-21, 53). Also, on said day, said District Court appointed as general counsel for the said Receivers, one Nat S. Brown, who was, at said time, vice-president and general solicitor of the Wabash Railway Company (R. 21-22, 16).

Thereafter, on March 19, 1932, said District Court appointed a Special Master to hear claims of Wabash Railway Company's creditors (R. 22-23).

Thereafter, on April 7, 1932, said District Court made an order for the filing with, and hearing by, the Master of claims of creditors of the Wabash Railway Company (R. 23-25). No provision was made in such order relative to the form or contents of proofs of claim.

Thereafter, and within the time fixed by said order, petitioner filed with the Special Master his claim on his said judgment which was then pending on appeal in the Supreme Court of Missouri (R. 102, 106-107).

Thereafter, on August 31, 1932, the Wabash Receivers filed with the Special Master their answer to petitioner's said claim, admitting that judgment was rendered in favor of petitioner, as claimed by him, denying that the claim was entitled to any preference or priority, and praying that, if petitioner's claim be allowed, it be not classified as to be entitled to any priority or preference (R. 109).

On August 26, 1935, and on January 6, 1936, a hearing was had before said Special Master upon petitioner's claim (R. 102-105). Thereafter, on March 7, 1936, the Special Master filed in said District Court his partial report covering, among other things, petitioner's said claim, and reporting that petitioner's claim should be allowed in the aggregate sum of $10,587.15 as a general unsecured claim and without any lien or priority (R. 34-37). Peti-

tioner had no notice of the filing of such report until about the time he applied for leave to file, in the said District Court, his hereinafter mentioned petition (R. 62). At the time petitioner sought to file in the said District Court his hereinafter mentioned petition, said report of the Master had not been approved or confirmed by said District Court (R. 62).

On March 1, 1937, and November 1, 1937, respectively, the trustees, under two mortgages, filed their respective bills of complaint against the Wabash Railway Company for mortgage foreclosures and other judgments incident thereto. Both of these proceedings were consolidated with the original receivership proceeding against the Wabash Railway Company; the Receivers appointed in said original cause were continued as Receivers in said consolidated cause; and said consolidated cause was, and is being, carried on in said District Court as Consolidated Cause in Equity, No. 12,099 (R. 37-44, 66-67, 80-81, 114-115).

On October 8, 1933, the said Walter S. Franklin having resigned as such Receiver (R. 32), the said District Court appointed, as his successor, one Norman B. Pitcairn (R. 33-34, 52).

On January 26, 1938, petitioner filed in the said District Court, and in said consolidated cause, an application for leave to file therein a petition in the form to said application attached, and which petition asserted a right to have petitioner's said judgment paid as a prior claim and operating expense, and prayed, among other things, the discharge of said Receivers and the termination of the receivership, for the reasons mentioned in such petition and to the end that petitioner should not be further delayed or hindered in the collection of his judgment (R. 47-77). Said

petition, in substance, alleged the matters hereinbefore referred to, and, also, among other things, that:

Section 77 (n) of the Bankruptcy Act, enacted subsequent to the commencement of the Wabash Railway Company receivership (and as existing at the time petitioner's said application was filed) provided that, in proceedings under said section for the reorganization of a railroad, claims for personal injuries to the employees of such railroad shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad (R. 69); that, because of such statutory provision, petitioner is entitled to have his said judgment paid to him immediately and his said right should not be impaired on account of the nature of the proceeding in which a reorganization of the Wabash Railway Company is sought; that under the rule and principle that equity follows the law, petitioner is entitled to the payment of his judgment as provided by said Section 77 (n); that the District Court's restraining of petitioner's right to collect his judgment is contrary to the spirit and intent of said provision made in said Section 77 (n) for the protection and immediate payment of claims for personal injuries to employees of a railroad corporation (R. 74-75); that under the order of the Interstate Commerce Commission, effective July 1, 1914, and providing that all damages and costs adjudged against a railroad in favor of employees for personal injuries should be classified in the accounts of a railroad as operating expenses, the petitioner's judgment is and should be considered as, an operating expense (R. 66); that Wabash Railway Company had and has in the State of Indiana 357.46 miles of railway and other property of the reasonable value of many millions of dollars and the Receivers have been operating the same since their appointment; that it is the law of Indiana, as declared by its Supreme Court in the case of McCullough et al. v.

Union Traction Company of Indiana et al., 206 Indiana Reports 585, that claims for personal injuries arising in the operation of a railroad have a preference and priority over claims of mortgage creditors and should be considered and paid as operating expenses (R. 65-66); that the claim of petitioner is one entitled to priority over the liens of the mortgages, and is entitled to present payment as an operating expense.

The District Court denied petitioner's leave to file said petition, and, in so doing, in substance and effect ruled and held: that petitioner was but a general creditor; that his petition did not conform to the requirements of former Equity Rule No. 37; that petitioner's claim was an unsecured claim without lien or priority, and had correctly been so determined by the Special Master; that petitioner was estopped from asserting a claim for priority or preference (evidently because of petitioner's failure to except to the said report of the Special Master); that said petition stated no cause of action in equity; and that the granting of leave to file said petition would encumber and delay "the orderly process of these cases toward a reorganization of the properties of the defendant Railway Company" (R. 78-84). Thereupon, petitioner duly took an appeal to the United States Circuit Court of Appeals for the Eighth Circuit (R. 77-78, 84-99).

On May 13, 1939, after due submission, the United States Circuit Court of Appeals for the Eighth Circuit rendered its opinion and judgment upon petitioner's said appeal (R. 113-124), affirming the said judgment and decision of the said District Court. In its said opinion, so affirming said judgment and decision of said District Court, the said Circuit Court of Appeals held: "By subsection (n) of Section 77 of the Bankruptcy Act, as amended [11 U. S. C. A., par. 205 (n)], claims for personal injuries to employees of a railroad corporation are entitled to priority. • • •

But this subsection applies expressly to proceedings in bankruptcy, and * * * this is an equity receivership" (R. 120; 103 F. [2d], l. c. 1000); that, in an equity receivership proceeding for the reorganization of a railroad, personal injury claims of employees are general unsecured claims, without priority, and not entitled to payment as operating expenses; that the District Court had correctly decided that petitioner's said claim and judgment was a general unsecured claim and not entitled to any lien, priority or preference in payment; that petitioner, having failed to file exceptions to the said report of the Special Master, was estopped from asserting preference and priority of payment of his claim; and that the District Court had, and properly exercised, discretion to deny petitioner's application for leave to file his said petition in said consolidated cause.

Thereafter, on May 27, 1939, petitioner duly filed his petition for a rehearing in said cause in said Circuit Court of Appeals (R. 125-135) and said petition for rehearing was denied on the 12th day of June, 1939 (R. 137).

This Honorable Court granted a writ of certiorari limited to the question of the right of petitioner to intervene in the said consolidated cause in order to assert priority.

## V.

## SPECIFICATIONS OF ERROR.

### A.

The decision of said District Court and the decision of said Court of Appeals for the Eighth Circuit that petitioner's said judgment and claim is a general unsecured claim, without priority, and not entitled to payment as an operating expense is in conflict with the amendatory provision in Section 77 (n) of the Bankruptcy Act, enacted

while petitioner's petition for certiorari was pending in this Honorable Court, that, in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad.

B.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that petitioner's said claim and judgment against Wabash Railway Company is a general unsecured claim, and not entitled to any priority or preference in payment.

C.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that petitioner's said claim and judgment is not entitled to present payment by the Receivers of Wabash Railway Company, as an operating expense.

D.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that petitioner's failure to except to the report of the Special Master, appointed by the District Court to hear claims, estops petitioner from being heard upon a question of the correctness of the conclusions of law of the Master upon undisputed facts.

E.

The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that the District Court had, and properly exercised, a discretion to deny petitioner leave to file the petition which, on January 26, 1938, he presented and applied to said District Court for leave to file in said receivership proceeding.

## SUMMARY OF ARGUMENT.

### I.

Pending the determination by this Court of petitioner's petition for writ of certiorari, the Congress enacted a law which requires that in an equity receivership of a railroad corporation "now or hereafter pending" in any court of the United States, claims such as that of petitioner "shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad," and this case should now be decided according to the law as it now exists.

Section 77-(n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)], as amended by Act of Congress approved August 11, 1939;

United States v. Schooner Peggy, 1 Cranch. 103, 109;

Dinsmore v. Southern Express Company et al., 183 U. S. 115, 120;

Texas Company v. Brown, 258 U. S. 466, 474;

Home Savings & Loan Association v. Plass (C. C. A. 9), 57 F. (2d) 117;

Lewis' Sutherland Statutory Construction, 2nd Ed., Sec. 285.

### II.

(A) Independent of said Act of Congress approved August 11, 1939, petitioner's judgment and claim, being for personal injuries sustained by him while performing his duties as an employee of Wabash Railway Company, arose and grew out of the operation of said railroad, and, therefore, is entitled to be preferred and paid as an operating expense.

Bowen v. Hockley et al., 71 Fed. (2d) 781, 783-786 (C. C. A. 4);

McCullough v. Union Traction Co. et al., 206 Ind. 585, 598-605, 186 N. E. 300, 305-307;
Central Hanover Bank & Trust Co. et al. v. Williams, 95 F. (2d) 210, 212 (C. C. A. 8);
Thompson v. Siratt, 95 F. (2d) 214, 217, 218 (C. C. A. 8);
Johnson v. United Railways Company, 247 Mo. 326, 373, 152 S. W. 362, 374 (dissenting judge's interpretation of what majority opinion holds).

(B) Equity follows the law and therefore, even prior to the enactment of the said amendatory act of August 11, 1939, specifically requiring the same, a railway employee's personal injury claim against a railroad was, in an equity receivership proceeding for the reorganization of such railroad, entitled to be preferred, and paid as an operating expense, in the same manner, and to the same extent, as if the railroad was being reorganized under Section 77 of the Bankruptcy Act as then existing.

Michigan v. Michigan Trust Company, Receiver, 286 U. S. 334, 346;
Bowen v. Hockley et al., 71 F. (2d) 781, 785.

(C) Wabash Railway Company is an Indiana corporation owning railway lines and property in Indiana. Under the law of Indiana personal injury claims against a railroad are entitled to priority and payment as operating expenses. The applicable decision of the Indiana Supreme Court speaks of "claims" for personal injuries, and does not restrict its holding to "judgments" recovered in the courts of Indiana on account of such claims.

McCullough v. Union Traction Company of Indiana, 206 Ind. 585, 598-604, 186 N. E. 300, 305-307.

(D) Under the orders and classification made by the Interstate Commerce Commission, by an order effective

July 1, 1914, petitioner's said claim and judgment is and should be considered and paid as an operating expense.

McCullough v. Union Traction Co. et al., 206 Ind. 585, 607 et seq., 186 N. E. 300, 308-309.

III.

The petitioner's failure to except to the report of the Special Master, appointed by the District Court to hear claims, does not (as the courts below held) estop petitioner from being heard upon a question of the correctness of the conclusions of law of the Master upon undisputed facts.

Employer's Liability Assurance Corporation v. Astoria Mahogany Company, 6 F. (2d) 945, 946 (C. C. A. 2);
Holman v. Cross, 75 F. (2d) 909, 913 (C. C. A. 6);
Lone Star Gas Company v. City of Fort Worth, 93 F. (2d) 584, 585 (C. C. A. 5);
State of Oklahoma v. State of Texas, 268 U. S. 252, 257;
Central Improvement Company v. Cambria Steel Co., et al., 201 F. 696, 699-700 (C. C. A. 8).

IV.

Petitioner has an absolute right to intervene in said consolidated cause for the purpose of asserting his right to have his said claim and judgment preferred and paid as an operating expense.

Rule 24, (a), New Federal Rules of Civil Procedure;
Credits Commutation Co. v. United States, 177 U. S. 311, 315-316;
Minot v. Mastin, 95 F. 734, 739 (C. C. A. 8);
Central Trust Company v. Chicago, R. I. & P. R. Co., 218 F. 336, 339 (C. C. A. 2);
Western Union Telegraph Company v. United States and M.-T. Co. et al., 221 F. 545, 552 (C. C. A. 8);
Swift v. Panther Oil & Gas Co., 244 F. 20, 30 (C. C. A. 8).

## ARGUMENT.

### I.

### (Assignment of Error A.)

While petitioner's petition for certiorari was pending in this court, the Congress, by an act approved August 11, 1939,* amendatory of Section 77 (n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)], added:

> "* * * equity receiverships of railroad corporations now or hereafter pending in any court of the United States,"

as a further type of proceeding in which

> "* * * claims for personal injuries to employees of a railroad corporation * * * shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad."

The Circuit Court of Appeals for the Eighth Circuit held, in the proceeding here sought to be reviewed, that petitioner's claim, although a claim against a railroad corporation in equity receivership in a federal court for personal injuries to an employee of such railroad corporation, was but a general unsecured claim, and entitled to no lien or priority (R. 119-121; 103 F. [2d], l. c. 1000), and further ruled that Section 77 (n) of the Bankruptcy Act, as it then existed, giving priority to railway employees' personal injury claims "* * * applies expressly to proceedings in bankruptcy, and * * * this is an equity receivership," so that petitioner's claim was not entitled to the priority given by said section 77 (n).

The situation now presented is that, pending the determination by this Honorable Court of petitioner's petition

* The act approved August 11, 1939, is set out in full in the appendix hereto, together with Section 77 (n) of the Bankruptcy Act as amended thereby.

for writ of certiorari, a law which, in effect, guarantees unto petitioner the right to have his claim and judgment preferred and paid as an operating expense was enacted, and the case should now be decided according to the law as it now exists.

The following rule was announced by Chief Justice Marshall in United States v. Schooner Peggy, 1 Cranch. 103, 109:

> "It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

The first part of the above pronouncement of Chief Justice Marshall was later quoted with approval by this Court in Dinsmore v. Southern Express Company et al., 183 U. S. 115, 120.

Likewise, in Texas Company v. Brown, 258 U. S. 466, 474, this Court, in discussing the effect of a law enacted after a judgment rendered below, and pending hearing on appeal, said:

> "Although passed after the decree below, this act must be given effect in deciding the appeal, * * *."

In Home Savings & Loan Association v. Plass (C. C. A. 9), 57 F. (2d) 117, the Court quoted with approval from Lewis' Sutherland Statutory Construction, 2nd Ed., Sec. 285, the following:

"If there has been a change or alteration or repeal of the law applicable to the rights of the parties, after the rendition of judgment, and pending an appeal, the case must be heard and decided in the appellate court, according to the existing law."

It is petitioner's contention that the holding of the District Court and the Circuit Court of Appeals, as to the classification of petitioner's claim, was incorrect, and that the Act of Congress, approved August 11, 1939, is but declaratory of the equitable principles which were theretofore applicable to claims such as that of petitioner. However, even if the petitioner's contention be incorrect, and even if the District Court and the Circuit Court of Appeals were correct in deciding, under the law as it then existed, that petitioner's claim was but a general unsecured claim, and not entitled to priority or payment as an operating expense, such determination and holding of those courts is incorrect under the now existing law enacted during the pendency of petitioner's petition for writ of certiorari herein, and the instant case should, we respectfully submit, be determined by this recent enactment which gives such claims a preferred status so as to be payable out of the assets of a railroad corporation in equity receivership as operating expenses of such railroad.

It is obvious that, in so changing and amending Section 77 (n) of the Bankruptcy Act, the Congress has undertaken to guarantee relief unto petitioner, and others similarly situated, from any inequitable classification of his and their claims, and any inequitable distinction between claims of an identical character in different types of proceedings involving the reorganization of a railroad.

## II.

### (Assignment of Errors B and C.)

Even absent the Act of Congress approved August 11, 1939, the holding of the District Court and the Circuit Court of Appeals, as to the classification of petitioner's claim, was incorrect, as being contrary to the equitable principle which, irrespective of said act, were and are applicable to claims such as that of petitioner.

Undoubtedly it was through a recognition of the fact that employees' claims for personal injuries bear a direct relationship to the operation of a railroad, and arise out of services through which a railroad is maintained as a going concern, and without which services and operation its property and the liens of mortgages thereon would become worthless, that Congress was prompted to and did provide by Section 77 of the Bankruptcy Act (as originally enacted), that, in proceedings thereunder for the reorganization of a railroad, employees' personal injury claims shall be preferred, and paid as operating expenses. The decision of the Circuit Court of Appeals that such rule did not obtain when a railroad was being reorganized through means of a receivership action, would have operated to make a railroad employee's ability to secure the protection which Congress had recognized he was entitled to receive, dependent, not upon those humane principles and concepts of justice which prompted such legislation, but, rather, upon the **nature of the proceeding** which those in control of a railroad, or its securities, elected as the means of effecting a reorganization. The injustice of such holding is even more marked by the fact that, as to the choice of form of a reorganization proceeding, an injured employee obviously has no voice.

The situation presented at the time of, and by, the de-

cisions of the courts below, was that, if the insolvent Wabash Railroad was being reorganized under Section 77 of the Bankruptcy Act, the petitioner's claim for personal injuries, sustained through his contribution to the maintenance and operation of the Wabash, would have been entitled to immediate payment in full [see 11 U. S. C. A., Sec. 205 (n), as it even then provided with respect to such claims]; but, under the decision of the courts below, because the Wabash reorganization proceeding is in the nature of an equity receivership, the petitioner's claim would be practically worthless.*

This Court, through its familiarity with matters of common knowledge, judicially knows that there are other railroads being reorganized under Section 77 of the Bankruptcy Act, in the federal courts within the territorial jurisdiction of the District Court below, and that, therefore, such railroads' employees' personal injury claims have been paid in full (Cf. Central Hanover Bank & Trust Co. v. Williams [C. C. A. 8], 95 F. [2d] 210; Thompson v. Siratt [C. C. A. 8], 95 F. [2d] 214). Here, however, the courts below hold that the same kind of a claim, must, by the same courts, be adjudged to be a general unsecured claim; and this, in effect, because those in control of the situation have seen fit to continue to seek a reorganization through a "friendly" receivership proceeding, rather than through a proceeding under said Section 77 of the Bankruptcy Act.

Petitioner respectfully submits that, just as uniformity of decisions of the federal courts on federal questions is of the utmost importance in the administration of justice, and that the rights of parties should be determined according to a uniform law of the land, and not according to the

*The record shows that the Wabash is hopelessly insolvent, and if petitioner is but a general creditor, then he can, at best, be expected to receive, at some uncertain date, some form of securities, the worth of which is doubtful.

locality of the district in which a cause is tried, so is it equally true that the right of this petitioner, as an injured employee, should be protected in accordance with the principles laid down by Congress, and not determined by the **nature of the proceeding** in which a federal court has ordered him to file his claim.

We submit that a federal court of equity may not use its power to operate a railroad, without regard to the priority which Congress has recognized that employees' personal injury claims should receive.

If, as the court below has ruled, the preference accorded railroad employees' personal injury claims, in proceedings under said Section 77 (n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n), as it existed at the time of such ruling], was not to obtain in an equity receivership proceeding for the reorganization of a railroad, how could such ruling be reconciled with the ancient and undisputed rule that "equity follows the law"? Here we have a situation in which the law-making body of the United States had accorded to railroad injured employees preferential rights in a railroad reorganization conducted through a **statutory** proceeding. Was not equity obligated to follow such law when it undertook to classify and determine the priorities of such a claim in an equity proceeding?

But, independent of the said provisions of Section 77 of the Bankruptcy Act, there are other reasons why this Court should review the decision of the court below that a railroad employee's personal injury claim is but a general claim, and not entitled to any preference or priority in payment.

The conflict of the decision of the court below with the applicable decision of the Circuit Court of Appeals for the Fourth Circuit, in the case of Bowen v. Hockley et al., 71 F. (2d) 781, as well as the true principles of equity in the premises, readily appear from the following excerpts from

the opinion of the Circuit Court of Appeals for the Fourth Circuit, in said case of Bowen v. Hockley, 71 F. (2d), l. c. 783-786:

"* * * Uninjured laborers contribute by their labor to the operation of the business and are paid on the basis of that contribution. The employee who is injured or killed has made his contribution, * * *; and in equity and good conscience the compensation award should be held a charge on the income of the business, just as is the wage of the laborer * * *.

"The principle of equity applicable is that he who seeks equity must do equity. Creditors and lien claimants need not seek the aid of equity in enforcing debts and liens. When they ask a court of equity to grant the extraordinary relief of protecting a private corporation's business from the legal process of its creditors and to operate it under order of court so as to preserve its going concern value for their benefit, they should be willing that the claims of those who have helped to give it value as a going concern and whose claims have been imposed upon it by law as a fixed expense should be paid from the income derived from its continued operation" (71 F. [2d], l. c. 783).

"For the court not to require its receiver to make the compensation payments which the state law requires of the owner of the business, would place it in the position of using its power to preserve the business for stockholders and creditors, without regard to the most helpless class of those having claims against the business itself" (71 F. [2d], l. c. 785).

"The fact that the statute does not provide for the protection of those receiving compensation payments and that no decision has dealt with their rights in the absence of statute, is no reason why a court of equity in undertaking the operation of the business should not safeguard their rights. One of the glories of equity jurisprudence is that it is not bound by the strict rules of the common law, but can mold its decrees to do justice amid all the vicissitudes and in-

tricacies of life. The principles upon which it proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations" (71 F. [2d], l. c. 786).

"Surely a court of equity, which has found means in receivership proceedings to protect the claim of the coal company which has furnished coal, the steel company which has furnished rails, and the workman who has furnished labor prior to the receivership, is not powerless to protect the rights of the injured employee in the business which he has helped to build" * * * (71 F. [2d], l. c. 786).

In Bowen v. Hockley et al., supra, the claim had been liquidated by an award by the Workmen's Compensation Commission. In the case at bar, petitioner's claim for injuries sustained by him as an employee, was liquidated by the judgment of a court. Both claims arose out of the contribution, by an employee, to the operation of his employer's business. Whether the tribunal determining the responsibility of the employer, and the amount of the claim, be a commission or a court, and whether the claim, as liquidated, be denominated an "award" or a "judgment," is, of a certainty, immaterial.

The court below, has, in substance, and in direct conflict with said decision of the Circuit Court of Appeals for the Fourth Circuit, held that an employee's personal injury claim is but a general claim, and that a court of equity, while operating a business through its receivers, should not require the receivers to pay an injured employee a claim for which he has recovered a judgment, and which judgment he would be entitled and able to collect, in the absence of the Court's possession and operation of the property and business through its receivers.

It may be said, however (as mentioned in the decision of the court below), the weight of authority in federal courts has long been that employees' claims for personal

injuries are but general claims. But this is sufficiently answered by the language in Bowen v. Hockley, supra, that:

> "The principles upon which it (equity jurisprudence) proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations" (71 F. [2d], l. c. 786).

By said provisions of Subsection (n) of Section 77 of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)] Congress has recognized the necessity and justice of preferring, and paying as operating expenses, the personal injury claims of railroad employees. Can it be reasonably contended that a court of equity, in its consideration of claims of this character, should be any less just and reasonable, or less conscious of changing views, than Congress?

It is significant to note that the Interstate Commerce Commission, by an order effective June 1, 1914, prescribing a classification of operating revenues and operating expenses for the use of carriers by rail, in keeping of their revenue and operating expense accounts, required that all damages and costs adjudged against a railroad company in favor of employees for personal injuries should be classified as operating expenses (R. 66).

With reference to such order the Supreme Court of Indiana, in the case of McCullough v. Union Traction Co., 206 Ind. 585, 607 et seq., 186 N. E. 300, 308 et seq., said:

> "We cannot agree to the proposition that the rules prescribed by the Interstate Commerce Commission is merely a bookkeeping method." * * *
>
> "The contention that the regulations prescribed by the Interstate Commerce Commission is merely a bookkeeping method is untenable. If the contention is true, then the system is absolutely meaningless and without substance."*

* The Wabash is an Indiana corporation, and a large part of its railway system is located in Indiana (R. 65-66).

In said case of McCullough v. Union Traction Co. of Indiana, 206 Ind. 585, 598-604, 186 N. E. 300, 305-307, the Court said:

> "If such claims are operating expenses of a railroad when operated by a receiver why are they not operating expenses before a receiver has been appointed?"
>
> "* * * In the operation of railroads, accidents, and injuries to persons and property, are unavoidable, and the payment and settlement of such claims must necessarily be considered as operating expenses." * * *
>
> "* * * So, in the instant case, the mortgagees for years had intrusted the property covered by the mortgage to the mortgagor for his complete control and management. They knew that in the natural course of events damage to property, and injury to persons would be done by the negligence of the servants of the mortgagor in the operation and management of the Traction Company. They knew when they took their mortgage that railroads cannot be operated, and managed over a long period of time, without damage to property, and injuries to persons. They also knew that it is the law of the land, that those damaged, and injured through the negligence of the railroad would be entitled to recover their damage whatever it may have been. And knowing all of these facts is it not sound reason to say that they took the mortgages with knowledge of the fact that the operating expenses of the road must be paid? And it must be conceded that such claims are considered operating expenses."

## III.

### (Assignment of Error D.)

The court below, has, in effect, decided that petitioner's failure to except to the report of the Special Master, appointed by the District Court to hear claims, estops petitioner from being heard upon a question of the correctness

of the conclusions of law reached by the Master upon undisputed facts. Such decision is in conflict with the applicable decisions of the Courts of Appeals for other circuits. (It will be borne in mind that the Special Master's said report had not been confirmed and petitioner alleged that he had but recently learned of its having been filed [R. 62].)

In Employers' Liability Assurance Corporation v. Astoria Mahogany Company, 6 F. (2d) 945, 946 (C. C. A. 2), the Court said:

> "Orders of foreclosure are primarily intended for no more than safety in distribution. • • • They enable the receivers to dispose of the property, but not to forfeit the rights even of dilatory creditors."

In Holman v. Cross, 75 F. (2d) 909, 913 (C. C. A. 6), the Court said:

> "It is to be noted that, with respect to the defendants who did not except, the Court confirmed the Master's report upon the facts, but noticed such legal conclusions as found no support therefrom under the rule of Smith v. Seibel et al. (D. C.), 258 F. 454. This course we approve."

In Lone Star Gas Company v. City of Fort Worth, 93 F. (2d) 584, 585 (C. C. A. 5), the Court said:

> "The Master's report is not unassailable as is argued. The reference does not appear to have been by consent of both parties to an agreed Master, but if it had been it would, under the new Equity Rule 61½, 28 U. S. C. A., following section 723, be only advisory. The District Judge appears to have felt himself overmuch bound by it."

As appears from the record, there has been no hearing upon any Plan of Reorganization of Wabash Railway

Company and no distribution of its assets (R. 67). Clearly, therefore, the petitioner's failure to file exceptions to the Special Master's said report has not prejudiced, and could not prejudice, the rights of any party whatsoever. In the case of State of Oklahoma v. The State of Texas, 268 U. S. 252, 257, this Court said:

> "Only where conduct or statements are calculated to mislead a party and are acted upon by him in good faith to his prejudice can he invoke them as a basis of such an estoppel."

## IV.

### (Assignment of Error E.)

Under the circumstances in this case, the petitioner has an absolute right to intervene in said Consolidated Cause for the purpose of asserting his right to have his said claim and judgment preferred against and paid out of the assets of Wabash Railway Company as operating expenses of said railroad. The property of Wabash Railway Company is in the exclusive jurisdiction and subject to the exclusive disposition of the said District Court, and petitioner's said claim can be established, preserved and enforced in no other way than by the determination and action of that Court in said Consolidated Cause.

Rule 24 (a) of the New Federal Rules, gives an absolute right to intervene "* * * when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the Court or of an officer thereof."

In Credits Commutation Co. v. United States, 177 U. S. 311, 315-316, this Court quoted with approval the following portion of the opinion of the Circuit Court of Appeals for the Eighth Circuit in its consideration of such case:

> "It is doubtless true that cases may arise where

the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief."

In the case of Minot v. Mastin (8th C. C. A.), 95 F., l. c. 739, the Court said:

"There are other cases, however, where the right of a third party to intervene in a pending case is so imperative, resting, as it does, on grounds of necessity, and the inability of the party to obtain relief by other means, that the right cannot be said to be dependent upon judicial discretion."

In the case of Central Trust Company v. Chicago, R. I. & P. R. Co. (2nd C. C. A.), 218 F. 336, l. c. 339, the Court said:

"There is a class of cases where the claimant's rights are finally disposed of and intervention is necessary for their protection, in which the right to intervene is absolute. * * *

"* * *. The circumstances of this case are such as to cause us to think that the intervention should have been allowed. Very substantial rights are involved and serious objections made. * * *

**"The orders certainly did completely dispose of the petitioner's claims and left nothing further to be done as to them in the litigation."**. (Emphasis ours.)

In the case of Swift v. Panther Oil & Gas Co. (8th C. C.

A.), 244 F., l. c. 30, the late Judge Walter H. Sanborn restated clearly the controlling law as follows:

> "In intervention there are two classes of cases—one class in which the intervention is not indispensable to the preservation or enforcement of the claim of the petitioner, and there the permission to intervene is discretionary with the Court; another class in which the petitioner claims a lien upon or an interest in specific property in the exclusive jurisdiction and subject to the exclusive disposition of the Court, and his interest therein can be established, preserved or enforced in no other way than by the determination and action of that Court. The petitioner, who has a claim of the latter class, has an absolute right to intervene in the proceeding in which the Court holds the exclusive custody and dominion of the property; permission for him to intervene is not discretionary with the Court, and he may review by appeal an order refusing that right (cases cited)."

In view of the said amendatory act of August 11, 1939, providing, as it does, that in equity receiverships of railroad corporations NOW or hereafter pending in any court of the United States, claims, such as that of petitioner, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad, there can be no question but that petitioner is, at this time, independent of every other consideration, entitled to take all such steps, and have made all such orders, as are necessary and proper, to the end that his said judgment and claim shall be preferred and paid out of the assets of Wabash Railway Company as an operating expense of such railroad.

## CONCLUSION.

We respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers by

reversing the judgment and decision of the courts below and making such orders as to this Court may seem necessary and appropriate to the end that petitioner's said claim and judgment be preferred and paid out of the assets of Wabash Railway Company as operating expenses.

Respectfully submitted,

MARK D. EAGLETON,
ROBERTS P. ELAM,
HYMAN G. STEIN,
Counsel for Petitioner.

## APPENDIX.

The Act of Congress approved August 11, 1939, is in words and figures as follows:

"[Public—No. 386—76th Congress]

[Chapter 689—1st Session]

[S. 2654]

An Act

To amend subsection (n), section 77, of the Bankruptcy Act, as amended, concerning payment of preferred claims.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first sentence of section 77, subsection (n), of the Bankruptcy Act, as amended, be further amended to read as follows:

"'In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustees appointed pursuant to this section, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad.'

"Approved, August 11, 1939."

---

Section 77 (n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)], as amended by the foregoing act approved

August 11, 1939, is as follows (italicized portion added by the act approved August 11, 1939):

"In proceedings under this section, *and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States,* claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustee appointed pursuant to this section, shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad. No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act, as amended June 21, 1934, or as it may be hereafter amended. No reorganization effected under this Act and no order of the Court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title."

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of the Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, THE CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

## REPLY BRIEF AND ARGUMENT OF PETER J. CARPENTER, PETITIONER.

MARK D. EAGLETON,
ROBERTS P. ELAM,
HYMAN G. STEIN,
Counsel for Petitioner.

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of the Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, THE CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

## REPLY BRIEF AND ARGUMENT OF PETER J. CARPENTER, PETITIONER.

### PART ONE.

### A REPLY TO THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, AS TRUSTEE (HEREINAFTER CALLED "THE CHASE NATIONAL BANK").

I.

To the argument of The Chase National Bank that Section 77 (n) of the Bankruptcy Act, as amended by the Act of August 11, 1939 (Pub. 386, Chap. 689, 76th

Congress, 1st Session), does not provide for an extension of "the time for filing" claims of railway employes for personal injuries, and does not provide that claims barred by the Statute of Limitations "or by other applicable limitations on the time for filing claims" shall nevertheless be paid, it is, we respectfully submit, sufficient answer, that:

(A) It is not disputable that *within the time fixed by the District Court for the filing of claims, the petitioner filed with the Special Master his claim on the judgment which he had recovered* against Wabash Railway Company, which judgment was then pending on appeal in the Supreme Court of Missouri (R. 23-24, 60, 115).

(B) The Chase National Bank does not cite any statutory bar or limitation of petitioner's claim (and in fact there is none).

II.

While the respondent The Chase National Bank contends to the contrary, we respectfully submit that said Section 77 (n), as amended by the Act of August 11, 1939, does not vest in the District Court a discretion as to whether an injured employe will be permitted to apply for, and receive, the preferential payment of his claim in accordance with the provisions of such statute. The language of the statute is unmistakable and mandatory. It provides without equivocation or exception that:

"* * * In equity receiverships of railroad corporations NOW or hereafter pending in any court of the United States, claims for personal injuries to employes of a railroad corporation, * * * SHALL be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad."

The District Court found, and therefore judicially knows,

that petitione 's claim is for personal injuries sustained in the course of his employment as an employe of Wabash Railway Company (R. 78). The equity receivership of Wabash Railway Company is "*now pending*" in said District Court. These facts are beyond controversy. Such being the case, and independent of every other consideration, the statute, in its present form, *commands* the preferential payment of petitioner's claim.

## III.

In its brief filed in opposition to petitioner's petition for writ of certiorari, respondent The Chase National Bank urged that the petitioner's rights, and the rights of other creditors, were fixed as of the date when the Receivers of the Wabash Railroad Company were appointed, and that said Section 77 (n) of the Bankruptcy Act, as amended by the Act of August 11, 1939, cannot be made applicable to petitioner's claim because the appointment of the Receivers for the Wabash Railway Company antedated the Act of August 11, 1939. While such contention is not advanced in the brief filed by respondent The Chase National Bank since the issuance of the writ of certiorari, and has possibly been abandoned, nevertheless petitioner, because of his understanding that the Court may refer to all briefs filed in its consideration of this cause, will answer such contention.

We well recognize that it is a general rule of equity that the rights of creditors in a receivership proceeding are fixed as of the date of the appointment of the Receiver. That rule, however, not only has its exceptions, but it is a rule of law in which persons have no vested right, so it may be changed by appropriate legislation. In this connection, in Thompson v. Siratt (C. C. A. 8), 95 Fed. (2d) 214, 217, it was appropriately said:

"No person has a vested interest in any rule of

law entitling him to insist that it shall remain unchanged for his benefit. Munn v. Illinois, 94 U. S. 113, 134, 24 L. Ed. 77; New York Central R. Co. v. White, 243 U. S. 188, 198, 37 S. Ct. 247, 61 L. Ed. 667, L. R. A. 1917 D 1, Ann. Cas. 1917 D 629."

And, further (l. c. 218):

"The legislation being a proper exercise of the bankruptcy power, there is no merit in the objection that it affects obligations incurred before its enactment. Canada Southern Ry. Co. v. Gebhard, 109 U. S. 527, 539, 3 S. Ct. 363, 27 L. Ed. 1020; Continental Illinois Nat. Bank v. Chicago, Rock Island & P. Ry. Co., 294 U. S. 648, 674, 55 S. Ct. 595, 605, 79 L. Ed. 1110; United States Nat. Bank v. Pamp (8 Cir.), 77 F. (2d) 9, 99 A. L. R. 1370; Campbell v. Allegheny Corp. (4 Cir.), 75 F. (2d) 947."

It has long been established that the rights of creditors, whether lien claimants or general creditors, are subject to the implied condition of prior payment of current expenses classified as operating expenses (Fosdick v. Schall, 99 U. S. 235, 252; Hale v. Frost, 99 U. S. 389, 391-392; Burnham v. Bowen, 111 U. S. 776, 780; Miltenberger v. Logansport R. Co., 106 U. S. 286, 311; Union Trust Company v. Morrison, 125 U. S. 591), so that a reasonable legislative classification of certain expenses as coming within the class of operating expenses may be made retroactive without in any manner impairing the rights of such lien claimants or general creditors. This is fully demonstrated by the decisions in Wise v. Chicago, R. I. & P. R. Co. (C. C. A. 7), 90 F. (2d) 312, cert. den. 302 U. S. 717; Central Hanover Bank & Trust Co. v. Williams (C. C. A. 8), 95 F. (2d) 210, and Thompson v. Siratt (C. C. A. 8), 95 F. (2d) 214, all of which upheld section 77 (n) as it existed prior to the amendment of August 11, 1939, which had the effect of retroactively classifying as preferred and

payable as operating expenses such claims as that of petitioner here. Note the chronological data in those cases, as follows:

| | Wise (nonemploye) 90 F. (2d) 312 | Williams (employe) 95 F. (2d) 210 | Siratt (employe) 95 F. (2d) 214 |
|---|---|---|---|
| Date of injury | Jan. 2, 1926 | Aug. 31, 1930 | Feb. 18, 1931 |
| Date of original judgment | Nov. 13, 1931 | May 24, 1932 | Apr. 20, 1934 |
| Date of final judgment | Nov. 16, 1934 | Nov. 5, 1935 | July 2, 1935 |
| Date of appointment of receivers | | Nov. 1, 1932 | |
| Date of appointment of trustees under Sec. 77 of Bankruptcy Act | June 7, 1933 | May, 1933 | June 22, 1933 |
| Date of legislation classifying claim as operating expense | Aug. 27, 1935 | Mar. 3, 1933, as amended Aug. 27, 1935 | Mar. 3, 1933, as amended Aug. 27, 1935 |

Prior to the amendment of August 11, 1939, the decision in the instant case in the Circuit Court of Appeals had been rendered (103 Fed. [2d] 996; R. 113-123), denying preference, such as had been given in the Wise, Williams and Siratt cases, supra, to a claim of an employe where the employer railroad was in equity receivership as distinguished from bankruptcy under Section 77 of the Bankruptcy Act.

The Congress is presumed to have known of these judicial determinations when it amended Section 77 (n) of the Bankruptcy Act by the Act of August 11, 1939, and so it conclusively appears that the Congress intended this amendment to have the same effect in equity receiverships as in reorganization proceedings under said section 77, in so far as the status of employes' claims is concerned. This is manifest from the report of the Judiciary Committee, reporting the Act of August 11, 1939 (then Senate Bill No. 2654 of the 76th Congress, First Session) favorably to the House of Representatives, for in that report,

dated August 4, 1939, Report No. 1458, First Session of the 76th Congress, the House Judiciary Committee said:

> "The purpose of the amendment, as it clearly appears, is to place injured employees and representatives of deceased employees, who have claims against railroads in equity receivership in the same position as persons of the same class who have claims against roads in trusteeship under section 77. Under the present law, the persons above designated who have judgments against roads in receivership for injuries received prior to receivership are classed as general creditors whereas judgments of such persons against roads in trusteeship are paid as operating expenses.
>
> "There is manifestly no sound reason for the existing discrimination. Both classes of claims, or, rather, the same kind of claims, should be given the same status. All alike grew out of the actual operation of the railroads, and all alike should be paid as operating expenses.
>
> "The bill is endorsed by the Railway Labor Executives' Association representing twenty of the standard railroad labor organizations, in the following language:
>
> " 'We urge that this bill be enacted at this session so that injured employees and representatives of deceased employees holding claims and judgments against roads in receivership may, without delay, be placed in the same position as employees and representatives of deceased employees who have claims and judgments against roads under trusteeship. All alike were injured while operating roads and all alike should be compensated out of operating expenses.' "

From the foregoing it clearly appears that the Congress intended the Act of August 11, 1939, to be applicable to claims such as that of the petitioner here, and to such intendment of Congress, we respectfully submit, the courts should give due effect.

Since the enactment of the Act of August 11, 1939, and subsequent to the decision of the instant case by the Cir-

cuit Court of Appeals for the Eighth Circuit, that same Circuit Court of Appeals has had occasion to construe and apply the Act of August 11, 1939, in the case of American Surety Company of New York v. Wabash R. Co. et al., No. 11,211 of that court, decided November 21, 1939, and not yet reported. In that case, American Surety Company of New York was assignee of a judgment which, prior to the receivership of the Wabash Railway Company, one Thomas P. Conroy had recovered against it on account of injuries sustained by him in the course of his employment as an employe of Wabash Railway Company, and from which judgment an appeal was pending at the time of the appointment of Receivers for the Wabash Railway Company. Conroy's said judgment having thereafter been affirmed, the American Surety Company of New York, which had executed the appeal bond as surety for Wabash Railway Company, paid Conroy his judgment, and took an assignment of it from him. The American Surety Company intervened in the Wabash Railway Company receivership proceeding, praying allowance of the amount of the Conroy judgment, as a preferred claim immediately payable by the Receivers. The District Court entered an order allowing the amount of the Conroy judgment as a general claim, and denying all preference, from which order the American Surety Company appealed. The Circuit Court of Appeals for the Eighth Circuit held that the American Surety Company, as assignee of the Conroy personal injury judgment, was entitled to have its claim preferred and payable as an operating expense under and by virtue of the Act of August 11, 1939, and in so holding said, in part:

> "Since submission of this appeal, the Act of August 11, 1939 (Pub. 386, Chap. 689, 76th Cong., 1st Session), amending subsection (n) of Section 77 of the Bankruptcy Act, as amended, has come into effect. (2) This Act has been brought to our attention and briefs have

been submitted as to the effect thereof upon this appeal.

"Appellant contends that it is entitled to the relief accorded by the above-amended subsection either because it is a surety upon a supersedeas bond in a personal injury suit or because it is the assignee of the personal injury judgment. We express no opinion upon the rights of appellant based upon its position as a surety on the supersedeas bond. We think the contention is sound as based upon its status as assignee of the judgment. This being our view, it is necessary to examine only such contentions of appellees as bear upon the rights of appellant as such assignee. • • •

"This is a highly remedial act. The rule of construction here applicable is that remedial acts are to be liberally construed to carry out the remedial purpose thereof. The purpose of this act is to secure relief for injured employees of railroads which have gone into bankruptcy or receivership after the injury and before satisfaction of the claim therefor against the railroad. • • •

"Appellee, Chase National Bank of the City of New York, contends that this act does not apply to personal injury claims which had been paid before the act became effective, because the rights of the parties were fixed theretofore—those of Conroy when the Receivers were appointed and those of appellant when the judgment was assigned. The argument and citations are really confined to the effect of the receivership upon the claim of Conroy. Reliance is placed upon the familiar rule that a receiver takes and holds the property subject only to such liens and equities as existed at the time of receivership. The citations (*Illinois Central Railroad Co. v. U. S. Fidelity & Guaranty Co.*, 87 Fed. [2d] 121, 123, C. C. A. 5; *In re K-T Sandwich Shoppe of Akron*, 34 Fed. [2d] 962, 963, N. D. Ohio) are to that effect. We have no quarrel with that rule but think it inapplicable. A long-established rule has been that certain labor and material claims arising before receivership have an

equity to be paid as operating expenses during receivership (*Fosdick v. Schall*, 99 U. S. 235). This is a judicially declared rule. What the courts could declare, obviously, the Congress could require. Heretofore, the courts have consistently decided that personal injury claims, arising in course of the operation of the railroad—even to employees—were without the rule. The reasons why the Congress could include injuries of employees is well stated for this Court by Judge Woodrough in *Central Hanover Bank v. Williams*, 95 Fed. (2d) 210, 212. Indeed, that case governs this point here. That case was upon subsection (n) as amended by the Act of August 27, 1935 (49 Stat. 911, 923), which provided that such personal injury claims to employees should be treated as payable as operating expenses in reorganization proceedings under Section 77 of the Bankruptcy Act. Clearly, the reasoning of that opinion is, since the further amendment by the Act of August 11, 1939, equally applicable to such claims in an equity receivership of a railroad.

"The order is reversed with instructions to allow the claim payable as an operating expense by the Receivers."

The foregoing decisions clearly illustrate that the rights of petitioner, with respect to the classification and payment of his claim, were not unalterably fixed as of the date of the appointment of receivers for the Wabash Railway Company, for those decisions, dealing with Section 77 (n) of the Bankruptcy Act, as it existed both before and after its amendment by the Act of August 11, 1939, permitted classification of claims thereunder, notwithstanding such claims may have arisen prior to the enactment of section 77 (n). Thus, we most respectfully submit, the appointment of receivers for the Wabash Railway Company prior to the Amendatory Act of August 11, 1939, does not preclude the petitioner from the benefits of such amendatory act.

## PART TWO.

## A REPLY TO CENTRAL HANOVER BANK & TRUST COMPANY, AS TRUSTEE.

### I.

The contention of respondent Central Hanover Bank & Trust Company, as Trustee, that the record fails to show the date of the respective mortgages on the property of Wabash Railway Company, and that no ruling which might affect the rights of the mortgagees should be made in the absence of a record showing of all of the facts pertaining to such mortgages, is wholly immaterial. This, for the reason that said section 77 (n), as amended by the Act of August 11, 1939, commands, without any exception whatsoever, that claims such as that of petitioner shall be preferred and paid as operating expenses. Accordingly, the only facts necessary to a determination of petitioner's right to such preference and payment are (a) whether his claim is that of an injured employe of Wabash Railway Company, for injuries sustained by him as such employe, and (b) whether the equity receivership of Wabash Railway Company is "now pending" in a "court of the United States."

Respondent Central Hanover Bank & Trust Company, in connection with its contention that the present record is not sufficient for the determination of questions suggested by said respondent, states (without any citation of authorities or demonstration of particulars) that there remains for decision the question of whether the Amendment of August 11, 1939, "does not conflict with the due process clause of the Fifth Amendment to the Constitution of the United States, as applied to the particular facts in this case." The record shows that the mortgages, in which the respondent trustees are interested, antedate the claim

of petitioner (R. 37, 40), and, therefore, the record fully presents the fact that the Act of August 11, 1939, if applied to petitioner's claim, gives to petitioner's claim a priority, notwithstanding the prior existence of such mortgages.

The constitutionality of Section 77 (n) of the Bankruptcy Act, as it existed before the Amendment of August 11, 1939, as well as thereafter, has been held in a number of reported decisions. In American Surety Company of New York v. Wabash Railway Company, supra, the Circuit Court of Appeals for the Eighth Circuit said:

> "The receivers argue that the District Court had no jurisdiction because this is an equity receivership and this Act is an amendment to the Bankruptcy Act. It is true that the jurisdiction of a District Court, acting in bankruptcy, is different and distinct from its jurisdiction in equity (*Hanna v. Brietson Mfg. Co.*, 62 Fed. [2d] 145; *Naylor v. Cantley*, 96 Fed. [2d] 761, 763, both in this court). However, there can be no doubt that this Act, while an amendment to the Bankruptcy Act, expressly applies to 'equity receiverships of railroad corporation.' We are not aware of any constitutional inhibition on Congress which would prevent it including such a provision in legislation amending the Bankruptcy Act."

In Wise v. Chicago, R. I. & P. R. Co. (C. C. A. 7), 90 Fed. (2d) 312, cert. den. 302 U. S. 717, there was directly involved the question of whether the classification of certain claims, payable by sureties, under section 77 (n) as it existed prior to the amendment of August 11, 1939, impaired vested mortgage rights or deprived mortgagees of their property without due process of law, in violation of the Fifth Amendment, or was unreasonable or arbitrary. The Circuit Court of Appeals for the Seventh Circuit, upon the authority of numerous previous decisions of this

Honorable Court, clearly and unequivocally ruled that the act in question did not violate the Fifth Amendment, did not divest mortgage or other rights, and did not arbitrarily or unreasonably classify such claims as operating expenses. In connection with whether the classification of these claims was arbitrary or unreasonable, the Court said, in part (90 Fed. [2d], l. c. 316):

> "Classification of claims as proper to be paid as current expenses from current income under the decisions cited is based, not upon the Bankruptcy Act, but upon the inherent rules of equity. Congress made no provision for the allowance of priority of current expenses in equity cases, but the Supreme Court found that equity itself demands such classification. * * * Obviously Congress, under its paramount jurisdiction in bankruptcy, may establish reasonable standards of provability and measures of allowance in order to work out equitable distribution of assets. * * * Congress may not arbitrarily classify an act as something, the attributes of which it does not partake, Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772, but it may always designate an act as coming within a certain category if in its inherent nature it may reasonably be said to be endowed with the qualities of such category. * * * Human care and judgment have never been able to eliminate accidents and consequent hurts to persons and property in such a hazardous business as that of operating a railroad. Injuries to the public through negligence are unfortunately far from infrequent; overflow of land because of embankments and levees occurs from time to time. In the very nature of things these risks and events attach to, emanate from and grow out of the process of earning income. They partake of the nature of operating expenses, and, therefore, may be classified by Congress as such expenses, payment of which from the income before payment to the mortgagee is only equitable. * * * The question of unreasonable and arbitrary classification is one aris-

ing upon the specific facts before us, which disclose that the debts to appellants originally were incurred in the earning of the income upon which the mortgagee claims a lien. Having been incurred in the process of earning the income, they partake of the nature of operating expenses and are not unreasonably classified as such."

Following the decision in the Wise case, supra, the Circuit Court of Appeals for the Eighth Circuit, in Central Hanover Bank & Trust Company v. Williams (C. C. A. 8), 95 Fed. (2d) 210, had before it the same section of the Bankruptcy Act in a case involving a claim for injuries to an employe of a railroad. It was there ruled that the District Court had properly allowed the claim as preferred and payable out of the operating revenues of the railroad in reorganization, the Court saying, in part (95 Fed. [2d], l. c. 210):

"The decisions demonstrate the necessity of allowing some preference in any liquidation and preclude any holding that preferences are generally or necessarily an unconstitutional taking of the property of the paramount lienors without due process. The line of adjudication constitutes recognition by the courts that Congress, when it made provision for uniform proceedings in bankruptcy reorganization, had the power to make classification among creditors, and it leaves the burden upon the bondholders here to demonstrate that the classification they complain of is arbitrary. * * * But we think it cannot be shown that the mere extension of preferences here complained of, which Congress has made beyond but in close analogy to those heretofore allowed of necessity by the courts, constitutes an arbitrary or confiscatory classification. The classification appears to have been made in the field where classification was necessary and well within the legislative powers. In re Chicago, R. I. & P. Railway Co., 7 Cir., 90 Fed. (2d) 312, 113, A. L. R. 487."

Again, the same result was reached by the same Court in the case of Thompson v. Siratt (C. C. A. 8), 95 Fed. (2d) 214, which also involved a claim for injuries to an employe of the railroad. Among other things, it was there said (95 Fed. [2d], l. c. 217-218):

> "In view of the Supreme Court's approval of the Six Months Rule in equity receivership cases, it cannot be denied that it is entirely proper for Congress to determine that some operating expenses be given a preference over mortgage debts. • • • In the enactment of Section 77 (n) Congress evidently considered that the extension of the term 'operating expenses' to include claims for personal injuries to employes is in the interest of the public, and that it is necessary and advantageous to a successful reorganization. It is a part of the legislative function to fix standards and establish limitations in bankruptcy, and when so determined they are not ordinarily subject to re-examination in the courts. • • • The fact that the definition and classification of 'operating expenses' adopted in the act is different from the definition worked out by the courts of equity does not condemn the inclusion of such claims, unless to do so is so arbitrary and unreasonable as to offend the due process clause of the Fifth Amendment. • • • Claims for personal injuries to employes bear a direct relationship to the operation of a railroad. They arise usually either out of its operation by means of which its income is produced or out of the preservation or repair of the property covered by the mortgagee's lien. In either case both the bondholder and the public are benefited by the service in which the injury occurred. Under the equity rule the cost of repairing broken or damaged equipment is allowed a preference. Under these circumstances it cannot be said that Congress was unreasonable in classifying as an operating expense the claims of employes injured in the performance of their duties as such employes. On principle such claims are not different from claims

for repairs. * * * Legislation recognizing that claims for personal injuries to employes are costs necessarily incident to the operation of railroads, and making special provisions for the payment of that cost, has been approved by the Supreme Court as not repugnant to the Fifth Amendment. Second Employes' Liability Cases, 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. * * * And we cannot say that the classification of claims for personal injuries to employes as preferred under subsection 77 (n) is so unreasonable and arbitrary as to violate the Fifth Amendment."

The decisions in Wise v. Chicago, R. I. & P. R. Co. (C. C. A. 7), 90 F. (2d) 312, certiorari denied 302 U. S. 717, 58 S. Ct. 37, 82 L. Ed. 554; Central-Hanover Bank & Trust Co. v. Williams (C. C. A. 8), 95 F. (2d) 210, and Thompson v. Siratt (C. C. A. 8), 95 F. (2d) 214, holding, as they authoritatively do, that Section 77 (n) of the Bankruptcy Act [11 U. S. C. A. § 205 (n)] did not violate the Fifth Amendment to the Constitution, prior to its amendment by the Act of August 11, 1939, how can it be said that the Amendatory Act of August 11, 1939, which did no more than extend the application of said section 77 (n) to equity receiverships, could be violative of the Fifth Amendment? If section 77 (n) did not deprive persons of their property without due process of law in a statutory reorganization proceeding, how could it do so in an equity receivership reorganization proceeding? These questions answer themselves, and conclusively demonstrate that the Act of August 11, 1939, as made applicable to equity receiverships, is in harmony with the Fifth Amendment.

II.

It is contended by respondent Central Hanover Bank & Trust Company that the petition, which petitioner sought

to file in the Wabash receivership proceeding below, did not pray that his claim be accorded priority, and that, therefore, he is not entitled to intervene in such proceeding for the purpose of asserting the priority of his claim. The said petition, however, does assert, together with the grounds therefor in detail, that petitioner was entitled to have his claim preferred and paid as an operating expense, and said petition clearly shows that the primary and ultimate purpose thereof was to establish a means for the enforcement of the preferential character of his claim.

It is firmly established that a bill in equity will not be dismissed if, upon its face, there is presented a cause for any relief (Kansas v. Colorado, 185 U. S. 125, 145; Geiger v. First-Troy Nat'l Bank & Trust Co. [C. C. A. 6], 30 Fed. [2d] 7, 9; Reconstruction Finance Corp. v. Central Rep. Trust Co. [D. C. Ill.], 11 Fed. Supp. 976, 979). We respectfully submit that, by the same token, if a petition for leave to intervene discloses *any* right which the petitioner is entitled to protect by means of intervention, his petition should not be denied merely because it does not pray for the specific relief to which his petition shows he is entitled. Moreover, in determining petitioner's application for leave to file his said petition, and as clearly appears in their respective opinions, the courts below treated as paramount and controlling the question of whether petitioner is entitled to have his claim preferred and paid as an operating expense. In addition to this, the Act of August 11, 1939, having been enacted since the filing of petitioner's application for leave to file his petition in the District Court, the Act of August 11, 1939, should be treated and considered as a part of petitioner's said petition, and petitioner's said petition should be construed and given effect in the light of the Act of August 11, 1939.

## PART THREE.

### A REPLY TO RESPONDENTS WABASH RAILWAY COMPANY AND ITS RECEIVERS.

The respondents Wabash Railway Company and its Receivers contend that petitioner has no right to intervene because the rights of petitioner, in the equity receivership proceeding, were protected and safeguarded by representation by parties to that proceeding, and by the order appointing the Special Master therein. In making this contention these respondents rely upon a further contention that the Act of August 11, 1939, amending Subsection (n) of Section 77 of the Bankruptcy Act, cannot be applied or considered in this connection.

As we understand the order issuing the writ of certiorari in this proceeding, that order permits consideration of the Act of August 11, 1939, in determining "the question of the right of the petitioner to intervene in order to assert priority," and we believe that we have established (Point I of Petitioner's Original Brief, pp. 14-16) that the Act of August 11, 1939, should here be considered by this Honorable Court to the end that this case be determined by the law as it now exists. It is obvious—and practically conceded by the argument made by respondents Wabash Railway Company and its Receivers—that, if the rights of plaintiff under the Act of August 11, 1939, are to be considered in determining the right of petitioner to intervene to assert priority, these rights are not protected and safeguarded either by representation or by the order appointing the Special Master, for at least three reasons, viz.: (1) there is no showing that any party to the equity receivership proceeding stands in the position of a representative of injured or deceased employes, or in the position of representing a class of persons entitled to such preferences as are granted by the Act of August 11, 1939, to injured em-

ployes or the representatives of deceased employes; (2) the Special Master having determined and reported on petitioner's claim long prior to the passage of the Act of August 11, 1939, could not have determined, protected and safeguarded petitioner's rights thereunder; and (3) the Special Master, having classified petitioner's claim as a general unsecured claim, in fact deprived petitioner of the preferences to which he is entitled under the Act of August 11, 1939.

## CONCLUSION.

The contention of respondent The Chase National Bank, to the effect that it is debatable and within the discretion of the court in which the Wabash Railway Company receivership is pending as to whether petitioner may be permitted even to file a petition for the preferential payment of his claim under the provisions of the Act of August 11, 1939, and the obvious inference that said respondent will, for the reasons assigned in its brief, oppose the filing by petitioner of any such petition in such court, not only is in conflict with the statement of respondent Central Hanover Bank & Trust Company to the effect that petitioner's rights, "if any, under the amended section, can be fully asserted in the receivership proceedings," but presages still further and tedious litigation for petitioner to obtain even a hearing of his claim for priority, unless this Honorable Court shall here and now settle his right to assert, and obtain his right to, the preferential payment of his claim.

We most respectfully submit that, for the reasons and upon the authorities relied on by petitioner herein, this case is one calling for the reversal of the judgments below, and the making of such orders by this Honorable Court as may be necessary and appropriate to the end that peti-

tioner's said judgment and claim be preferred and paid out of the assets of Wabash Railway Company "as an operating expense of such railroad."

Respectfully submitted,

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Counsel for Petitioner.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY et al., Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Eighth Circuit.

## BRIEF

**For Respondents, Wabash Railway Company, and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company.**

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# SUPREME COURT OF THE UNITED STATES.

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No. 230.

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## BRIEF

**For Respondents, Wabash Railway Company, and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company.**

The Respondents, Wabash Railway Company and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, state to the Court that they adopt as and for their brief in opposition to the petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, the brief of Respondent, The Chase National Bank of the City of New York, as Trustee, heretofore filed in opposition to said petition, and respectfully request that the Court accept and consider the brief of said Respondent as and for the brief of these Respondents now appearing, and that the Court will deny the petition for writ of certiorari.

These Respondents, however, and in addition to the brief of the Respondent, The Chase National Bank of the City of New York, as Trustee, state to the Court that on September 1, 1939, they received a supplemental brief in support of the petition for the writ of certiorari in which supplemental brief counsel for petitioner call attention to the Act of Congress approved August 11, 1939, which was long after all the proceedings were had, as shown by the record filed herein, and after the petition for the writ and the record were lodged in this court, and asked that the amendment of the Bankruptcy Act as made by said Act of Congress, approved August 11, 1939, be considered as applicable to the record, proceedings and evidence in the matter of the claim of the petitioner filed in the Wabash Receivership proceedings in the District Court of the United States for the Eastern District of Missouri on or before July 1, 1932.

These Respondents state to the Court that if it should be the judgment of the Court that the amendment to the Bankruptcy Act made by the Act of Congress, approved August 11, 1939, should be considered in determining whether said District Court erred in denying the application of the petitioner for leave to file an intervening petition (Record pp. 51 to 77), then, and in that event, the cause by an order of this Court should be remanded to the Circuit Court of Appeals, or to said District Court, so that the Circuit Court of Appeals might consider and determine whether the said District Court was in error in denying the application for leave to file the intervening petition, and that thereafter the cause might be remanded to said District Court for its consideration and determination whether, in the exercise of its judicial discretion in the light of the record and subsequent proceedings pertaining to the claim of the petitioner filed in said receivership suit, the application of the petitioner for leave to file said intervening petition ought to be granted or denied.

The Respondents respectfully call the attention of the Court to its decisions in the case of State ex rel. Wabash Railway Company v. Public Service Commission, 273 U. S. 126, 131; Patterson v. Alabama, 294 U. S. 600, 607, and the

decision in State Tax Commission of Utah v. Van Cott, No. 491, decided March 27, 1939, not yet officially reported, appearing in 59 Supreme Court Reporter 605, being a case on writ of certiorari to the Supreme Court of Utah.

In the case last mentioned the Court, in the opinion of Mr. Justice Black, stated the approved procedure in a quotation from Patterson v. Alabama, supra, as follows:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review, but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case."

The Court then said in the Van Cott case:

> "Applying this principle, we vacate the judgment of the Supreme Court and remand the cause to that court for further proceedings."

In the light of this statement of the principle, if the Court should consider that the judgment of the District Court and the decision of the Circuit Court of Appeals upon the application of the petitioner for leave to file said intervening petition, ought to be considered in the light of the amendment made by the Act of Congress approved August 11, 1939, then it would seem that the esablished and appropriate procedure to be followed in this cause, as now presented to this Court, would be to remand the cause to the Circuit Court of Appeals to be considered by that Court and thereafter remanded to the District Court if the Circuit Court of Appeals should be of the opinion that the Dis-

trict Court abused sound judicial discretion and erred in denying the application of the petitioner for leave to file said intervening petition under the facts and the law as might then be presented to that Court.

Wherefore, these Respondents, although still contending that the petition for writ of certiorari should be denied, respectfully show to the Court that if the Court should be of the view that the petition should not be denied, in that event the order of this Court should be that the cause be remanded to the Circuit Court of Appeals for the consideration and decision of that Court upon the record before it in the light of the amendment made by the Act of Congress, approved August 11, 1939, or to the District Court for its consideration, and for such alternative rule and order of the Court these Respondents will ever pray.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

PETER J. CARPENTER,
Petitioner,
vs.
WABASH RAILWAY COMPANY et al.,
Respondents.
No. 230.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

## BRIEF OF RESPONDENT, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, AS TRUSTEE, IN OPPOSITION THERETO.

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# SUPREME COURT OF THE UNITED STATES.

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On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

## BRIEF OF RESPONDENT, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, AS TRUSTEE, IN OPPOSITION THERETO.

### PRELIMINARY STATEMENT.

We are not satisfied with the statement of facts presented by the petitioner and are therefore submitting what we consider a more accurate and complete statement of the facts. Except where otherwise stated, all italics are ours.

for brevity, hereinafter referred to as "Appellant's Petition.")

I.

This Court inadvertently overlooked the allegation in "Appellant's Petition," and the point made and argued in his brief, that at, and ever since, the time appellant recovered his judgment against Wabash Railway Company, said company owned, and still owns, real estate in St. Louis, Missouri, having a reasonable value of more than $800,000.00 (R. 52). Appellant's said judgment was recovered in the Circuit Court of the City of St. Louis, Missouri, on February 13, 1931, and under the law of Missouri was and is a final judgment as of said date.

Under the provisions of Sections 1104 and 1105, Revised Statutes of Missouri 1929, said judgment was, and is, a lien on all of the real estate of Wabash Railway Company, situate in the City of St. Louis, Missouri, and such lien commenced on the day of the rendition of said judgment, and the Receivers thereafter took possession of, and hold, all such real estate subject to said lien.

While the Court's opinion treats of the questions relative to appellant's rights to priority over the liens of the mortgages, the Court has inadvertently overlooked a consideration of, and ruling upon, his said claim to a lien upon such real estate in the City of St. Louis.

Independent of what his rights may be, as against the liens of the mortgages, appellant's judgment lien on said real estate in St. Louis, Missouri, entitles him to a different status than that of general creditors having no lien (Appellant's Brief, pp. 23, 35-39).

II.

In its said opinion (pages 11-12) this Honorable Court, in substance, states that it is appellant's contention that,

under the law of Indiana, railway employees' claims for personal injuries are entitled to priority of payment as operating expenses, and that therefore the law of priority accorded to such claims by the law of Indiana should be made applicable "to all the properties of the Wabash, wherever situated."

While stating that Wabash Railway Company is an Indiana corporation, this Court, in its said opinion, inadvertently overlooked the allegation in "Appellant's Petition" that the company has railway lines and property in the State of Indiana reasonably worth many millions of dollars (R. 65-66). (See, also, Appellant's Brief, pp. 40-41.)

In such respect this Court has, in its said opinion, inadvertently overlooked the point made and argued in appellant's brief that:

> "Appellant's right to priority in the distribution of Wabash assets located in Indiana is in nowise affected by the fact that his injuries were not sustained in Indiana or that his judgment was recovered in the Missouri courts.
>
> "The said decision of the Supreme Court of Indiana states as a general proposition that personal injury claims against railroads are entitled to priority and payment as operating expenses. No limitation is made with reference to the state in which the injuries were sustained or a judgment recovered. In fact, the decision does not limit itself to judgments, but speaks and treats of all 'claims' for personal injuries" (Appellant's Brief, p. 43; see, also, Appellant's Brief, pp. 23-24, 40, 43).

This Court has inadvertently overlooked the proposition advanced in appellant's brief (pp. 40-41) to the effect that, while he submits for the consideration of the Court the suggestion that such priority should be made applicable as to all Wabash properties, wherever situate, since it is

an Indiana corporation, that, nevertheless, appellant does not "argue the same at length, **since Wabash does own properties in Indiana, out of which appellant's claim could be satisfied.**"

III.

This Court has inadvertently overlooked the decision of the United States Circuit Court of Appeals for the Fourth Circuit, in the case of Bowen v. Hockley et al., 71 Fed. (2d) 781, holding, among other things, that an employee's claim for personal injuries, sustained by him in the operation of his employer's business, is entitled to priority, and in equity and good conscience should be held a charge on the income of the business; and this Court has, in its opinion, overlooked the principle of equity announced in Bowen v. Hockley, supra, that:

> "The principle of equity applicable is that he who seeks equity must do equity. Creditors and lien claimants need not seek the aid of equity in enforcing debts and liens. When they ask a court of equity to grant the extraordinary relief of protecting a private corporation's business from the legal process of its creditors and to operate it under order of court so as to preserve its going concern value for their benefit, they should be willing that the claims of those who have helped to give it value as a going concern and whose claims have been imposed upon it by law as a fixed expense should be paid from the income derived from its continued operation" (Appellant's Brief, pp. 48-53).

IV.

Since the law of Indiana, as announced by its Supreme Court, is that a claim, such as appellant's, is entitled to priority and payment as an operating expense, and since

the Receivers have been and are in possession of, and operating, the properties of Wabash Railway Company in Indiana, this Court has inadvertently overlooked the principle announced by the United States Circuit Court of Appeals for the Fourth Circuit in Bowen v. Hockley, supra, that:

> "For the Court not to require its receiver to make the compensation payments which the state law requires of the owner of the business, would place it in the position of using its power to preserve the business for stockholders and creditors, without regard to the most helpless class of those having claims against the business itself. * * *" (Appellant's Brief, p. 52).

## V.

In holding that a claim, such as appellant's, is entitled to priority by Subsection (N) of Section 77 of the Bankruptcy Act, as amended, but not in an equity receivership, this Court has inadvertently overlooked that the Congress of the United States has, by said statute, recognized the necessity of allowing preference to such claims, and of the payment of the same as operating expenses, and that the giving, in an equity receivership, to appellant's claim a status inferior to that so prescribed by said statute, is not in accord with the public policy of the United States, as so determined and announced by Congress.

As decided by the United States Court of Appeals for the Fourth Circuit in Bowen v. Hockley, supra, an employee's claim can be accorded priority and paid as operating expenses in an equity receivership, independent of the existence of a statute, and, therefore, this Court has inadvertently overlooked the contention made and argued by appellant that, under the principle that equity follows the law, appellant's claim should be accorded priority, and paid as an operating expense, as provided by said

Subsection (N) of Section 77 of the Bankruptcy Act (Appellant's Brief, pp. 49-52).

VI.

In holding the Special Master's report on appellant's claim was final and conclusive this Honorable Court has inadvertently overlooked the fact, as pleaded in "Appellant's Petition," and argued in his brief, that no order had ever been entered by the District Court approving or affirming said report (R. 62; Appellant's Brief, p. 62).

VII.

In holding the Special Master's report on appellant's claim was final and conclusive, this Court has inadvertently overlooked the point made and argued by appellant that, as ruled by the United States Circuit Court of Appeals for the Sixth Circuit in Holman v. Cross, 75 Fed. (2d) 909-913, a Special Master's erroneous conclusions of law are not final or binding on the Court, or the aggrieved party, notwithstanding the absence of any exceptions thereto (Appellant's Brief, p. 62).

VIII.

In holding that the Special Master's report on appellant's claim was final and conclusive, this Court has inadvertently overlooked that, while the order appointing the Special Master provided that the various matters, therein mentioned, were referred to him for his investigation, determination and report, nevertheless, the **order as to the filing of claims which was thereafter made** merely provided that he was authorized "to investigate, hear proof and **report**" on claims filed, and that, therefore, appellant's

claim was referred to the Special Master merely for a **report** which was merely **advisory**, and that it was the **duty** of the **District Court** to **decide** appellant's claim (Appellant's Brief, pp. 26-28, 64).

IX.

In holding that the Special Master's report on appellant's claim was final and conclusive, this Court has inadvertently overlooked the rule, as stated by the United States Circuit Court of Appeals for the Fifth Circuit in Lone Star Gas Company v. City of Ft. Worth, 93 Fed. (2d) 584-585, and argued in appellant's brief, that a Special Master's report is merely advisory (Appellant's Brief, p. 64).

X.

In holding that the Special Master's report on appellant's claim was final and conclusive, this Court has inadvertently overlooked the fact, as pleaded in "Appellant's Petition," and argued in his brief, that the order for the filing of claims made no provision as to the **contents** of the proof of claims, and, as to such respect, made no requirement other than "that all persons having any such * * * claims shall file their claims," etc. (R. 24; see also Appellant's Brief, p. 56).

Appellant's claim set forth his judgment, and this Honorable Court has inadvertently overlooked the point made and argued by appellant to the effect that his priority and lien were dependent upon, and arise out of, law and equity, and, therefore, the various laws and rules and principles of equity, under which he claims a lien and priority, and the right to payment of his claim as an operating expense, are matters within the judicial notice of courts and not required to be either pleaded or proven (Appellant's Brief, pp. 56-64).

## XI.

In holding the Special Master's report on appellant's claim is final and conclusive, this Court has inadvertently overlooked the point made and argued in appellant's brief that, in the matter of filing and determining claims in an equity receivership proceeding, there is no occasion to deny a claimant the right to be heard in opposition to a Special Master's report during such time as the receivership is pending and before any distribution to creditors has been made (Appellant's Brief, p. 59).

## XII.

This Court, in its said opinion, inadvertently overlooked making any ruling upon the point, made and argued in appellant's brief, that the receivers of Wabash Railway Company are unfit and are not disinterested persons, and should be removed from office.

The opinion states that "the present receivers are alleged to be former executives of the Pennsylvania Railroad, or one of its subsidiaries; * * *."

This Court has inadvertently overlooked the fact and contention, alleged in "Appellant's Petition" and in his brief, that the original receivers, Frank C. Nicodemus, Jr., and Walter S. Franklin, were assistant general counsel and president, respectively, of Wabash Railway Company, and at the time of, and for some years prior to, the commencement of the receivership were maintained as such officers by Pennsylvania Railway Company, through its control of Wabash, and that Norman B. Pitcairn, who was named a receiver when said Walter S. Franklin resigned as Receiver to become an officer of Pennsylvania Railroad, was, for some years, a major executive or representative of Pennsylvania Railroad (R. 53; Appellant's Brief, 72-78).

XIII.

This Court inadvertently overlooked the point, made and argued in appellant's brief, that the receivership should be terminated because the frauds committed against Wabash Railway Company made necessary, for the protection of the company and its creditors, that any reorganization of the company should be under the provisions of Section 77 of the Bankruptcy Act, so that there would be available the highly remedial measures provided by Congress in said section 77 (Appellant's Brief, pp. 72-78).

XIV.

The Court inadvertently overlooked point X in appellant's brief that appellant, as a judgment and lien creditor of the Wabash, had an absolute right to move the termination of the receivership, the discharge of the Receivers and the dissolution of such injunction (Appellant's Brief, pp. 79-81).

XV.

The Court inadvertently overlooked the point, made and argued in appellant's brief, that Equity Rule No. 37 is no longer in effect and that this Court must give effect to Rule No. 24 of the New Federal Rules of Civil Procedure (Appellant's Brief, pp. 81-83).

XVI.

The Court inadvertently overlooked the point, made and argued in appellant's brief, that the orders, rulings and judgments here appealed from are violative of the Fifth Amendment to the Constitution of the United States (Appellant's Brief, p. 83).

XVII.

The Court inadvertently overlooked the point, made and argued in appellant's brief, that the enactment of Section 77 of the National Bankruptcy Act, providing for the reorganization of interstate railroads, has made unnecessary and undesirable a continuation of the receivership (Appellant's Brief, pp. 66-78).

XVIII.

The Court inadvertently overlooked the point, made and argued in appellant's brief, that appellant should have been permitted to file his petition because, as an interested party, he was entitled to move the discharge of the Receivers and present the question upon the situation existing at the time his petition was filed. In re Metropolitan Railway Company, 208 U. S. 90-112; 53 C. J. 87 (Appellant's Brief, pp. 80-81).

XIX.

The Court inadvertently overlooked the point, made and argued in appellant's brief, that any application made, at any time, to modify an existing injunctional order should be heard, and if the facts warrant it such order should be modified (Appellant's Brief, p. 81).

XX.

The Court inadvertently overlooked the fact that the frauds committed upon Wabash, as in "Appellant's Petition" set forth, have been investigated and denounced by members of a committee appointed by the United States Senate (Appellant's Brief, p. 5; R. 53-54).

We respectfully submit that for the foregoing reasons this petition for a rehearing should be granted.

ROBERTS P. ELAM,
MARK D. EAGLETON,
HYMAN G. STEIN,
Attorneys for Appellant.

The undersigned, solicitors for appellant Peter J. Carpenter, hereby certify that the foregoing petition for rehearing is not interposed for delay, but is presented and filed in good faith, and believed to be meritorious.

Roberts P. Elam,

Mark D. Eagleton,

Hyman G. Stein,
Solicitors for Appellant Peter J. Carpenter.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 27, 1939.

[fol. 137] (Order Denying Petition for Rehearing.)

May Term, 1939.

Monday, June 12, 1939.

The petition for rehearing filed by counsel for the appellant having been considered, It is now here ordered by this Court that the same be, and it is hereby, denied.

June 12, 1939.

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(Motion of Appellant for Stay of Issuance of Mandate.)

Comes now the Appellant in the above entitled cause and moves the Court to stay the Mandate in the above entitled cause, and as grounds for said Motion states:

1. Appellant intends to file an application in the Supreme Court of the United States for its writ of certiorari, directed to this Court, to issue in this cause, and counsel for Appellant are now engaged in the preparation of same.

2. No prejudice, under the particular circumstances of this case, can result to Appellees from a staying of this Court's Mandate pending Appellant's said application.

MARK D. EAGLETON,
ROBERTS P. ELAM and
HYMAN G. STEIN,
By Hyman G. Stein,
Attorneys for Appellant.

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Hyman G. Stein, being one of the attorneys for the above named Appellant, Peter J. Carpenter, hereby certifies that [fol. 138] the foregoing Motion to Stay Issuance of Mandate is not filed for delay, but is presented and filed in good faith.

HYMAN G. STEIN,
Of Counsel for Appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jun. 22, 1939.

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(Order Staying Issuance of Mandate.)

May Term, 1939.

Tuesday, June 27, 1939.

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

June 27, 1939.

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[fol. 139] (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Peter J. Carpenter was Appellant and the Wabash Railway Company, et al., were Appellees, No. 11354, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this eleventh day of July, A. D. 1939.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

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SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, limited to the question of the right of the petitioner to intervene in order to assert priority.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

## STATEMENT OF THE CASE.

The petitioner, Peter J. Carpenter, on February 13, 1931, in Division No. 14 of the Circuit Court of the City of St. Louis, recovered a judgment against the respondent, Wabash Railway Company, on account of personal injuries sustained by him while in its employ, in the amount of $15,000.00 and costs (R. 33, 78, 105, 106-107).

Thereafter, on December 1, 1931, the T. J. Moss Tie Company, a Missouri corporation, filed its bill of complaint against the said Wabash Railway Company in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, in Equity No. 9704, in which complaint it alleged that it was a general unsecured creditor of Wabash Railway Company; that said Railway Company was insolvent, that its railway lines and other properties were heavily mortgaged and that it was unable to pay its debts; and prayed for appointment of receivers of all the railway lines and properties of said Railway Company (R. 2-14, 79). The Railway Company filed its answer to said bill of complaint, in which it admitted the allegations in said bill and consented to the appointment of receivers (R. 14-16, 79). Thereupon, on said December 1, 1931, an order was entered in said cause appointing Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers of all the lines of railway and other properties of the Wabash Railway Company (R. 16-17, 79). Said order, among other things, provided that "all other persons, firms and corporations whatsoever and wheresoever situated, located or domiciled, be, and they are hereby, restrained and enjoined from interfering with, attaching, levying upon or in any manner whatsoever disturbing any portion of the property and premises of which Receivers are hereby appointed, or from taking possession of, or in any way interfering with, the same or any parts thereof, or from inter-

fering in any manner to prevent the discharge by said Receivers of their duties or the operation of said property and premises under the orders of this Court" (R. 20, 79-80).

Thereafter, on December 4, 1931, Wabash Railway Company, defendant, in Division No. 14 of the Circuit Court of the City of St. Louis, Missouri, took an appeal from the judgment in favor of Peter J. Carpenter, the petitioner herein, to the Supreme Court of the State of Missouri (R. 107).

On March 19, 1932, the District Court appointed Forrest C. Donnell Special Master, in Cause No. 9704, In Equity, invested him with the customary powers of a Special Master under the Federal Equity Rules, and "referred to him for his investigation, determination and report" all claims filed in said cause "by which the claimant, interpleader, intervenor or other pleader seeks to recover any money or property from the Receivers appointed in this cause out of the estate in their hands." *The order appointing the Special Master made no provision for the filing of exceptions to claims, the validity of which were uncontested,* but provided that the Special Master should, before finally settling his report in any contested case, furnish to parties in interest a copy of his proposed report, and that any of said parties desiring to except to all or any part of such report should file with the Special Master their exceptions thereto, and the Special Master would thereupon notify the parties of the date upon which he would hear said exceptions and finally settle his report (R. 22-23, 80).

On April 7, 1932, the District Court ordered that all persons claiming to be creditors, secured and unsecured, and having accounts, debts or claims against Wabash Railway Company should file their claims on account thereof with the Special Master, on or before July 1, 1932, and directed

the Special Master to investigate, hear proof and report on all claims by persons claiming to be creditors, both as to correctness and validity of all such accounts, debts and claims, and also as to the lien and priority, if any, thereof, after claimants had been given an opportunity to present and make proof, before said Special Master, of the amounts of their respective claims and the lien and priority, if any, thereof (R. 23-25).

The statement of claim of Peter J. Carpenter, the petitioner herein, against Wabash Railway Company, respondent herein, was verified by him on June 9, 1932. It recited that said claim was based on a judgment recovered by him against said Railway in the amount of $15,000.00, together with interest thereon at the rate of 6 per cent per annum, from the 14th day of February, 1931, the date of the rendition and entry of said judgment in cause No. 142,433, of the Circuit Court of the City of St. Louis, Division No. 14, and that said judgment was pending on appeal in the Supreme Court of the State of Missouri (R. 106-107), which, on June 2, 1934, entered a new judgment in favor of petitioner in the sum of $10,000 with interest and costs. *Said claim*, which was filed with the Special Master on or prior to July 1, 1932 (R. 102), *contained no prayers or assertion of right to any priority or preference in payment*. However, the Receivers for the respondent Wabash Railway Company on filing their answer to the above claim August 31, 1932, while admitting the judgment was rendered against said railway as alleged, expressly denied that said claim was entitled to any preference or priority in payment (R. 102, 109).

Thereafter, on October 8, 1933, Walter S. Franklin, upon having been elected a vice-president of the Pennsylvania Railroad, tendered to the District Court his resignation as one of the Receivers of the Wabash Railway Company

(R. 32), which was accepted (R. 33), and said Court appointed, as his successor, one Norman B. Pitcairn (R. 34).

Thereafter a hearing was had on petitioner's claim before the Special Master on August 26, 1935, at which hearing counsel for petitioner appeared and offered only a certified copy of the judgment of the Circuit Court of the City of St. Louis, but made no claim to any preference or priority in payment (R. 102-104). Thereafter, on January 6, 1936, and in the presence and hearing of counsel for petitioner (R. 104-105) the Special Master made the following statement:

> "On this 6th day of January, 1936, there being present Roberts P. Elam, attorney for claimant, the Special Master determined that, pursuant to bill of costs, being attached and marked 'Exhibit B,' hitherto presented to the Special Master by counsel for claimant in the above matter, the court costs hereinbefore referred to are hereby determined to be the sum of $104.15, wherefore, the Special Master determined that he shall report to the Court:
>
> "(a) That said claim, to the extent of $10,000.00 principal, plus $104.15, court costs, plus interest on said principal amount of $10,000.00, at the rate of 6 per cent per annum from February 13, 1931, to December 1, 1931, is correct and valid, and should be allowed in the aggregate of the said principal sum, court costs and interest, as a general unsecured claim, and that judgment should be entered thereon in the above-entitled cause in favor of said claimant Peter J. Carpenter, and against Defendant Wabash Railway Company in said aggregate amount;
>
> "(b) *That said claim is not entitled to any lien or to any priority over other general unsecured claims.*"

The record shows no objection or exception on the part of claimant's counsel to this determination. Thereafter, on March 7, 1936 (R. 34), pursuant to such findings, the

Special Master filed his report, together with a transcript of the proceedings before him, in which report he recommended that petitioner's claim be allowed as a general unsecured claim without any preference or priority over other unsecured creditors.

The record shows no exceptions to the Special Master's report filed within twenty days of the time of filing of said report as required by Equity Rule 66, and shows no exceptions to such report filed at any time.

On March 1, 1937, and November 1, 1937, respectively, the trustees, under two mortgages, filed their respective bills of complaint against Wabash Railway Company for mortgage foreclosures and other judgments incident thereto. Both of these proceedings were consolidated with the original receivership proceeding against the Wabash Railway Company; the Receivers appointed in said original cause were continued as Receivers in said consolidated cause, and said consolidated cause was, and is, being carried on in said District Court as consolidated cause in equity, No. 12,099 (R. 37-44, 66-67, 80-81, 114-115).

Such being the state of the record, the petitioner, on January 26, 1938, filed his application for leave to file his intervening petition, styled "Application of Peter J. Carpenter for Leave to File His Petition for Order Terminating Receivership of Wabash Railway Company and Dissolving Temporary Restraining Order and Injunction" (R. 47). Said petition alleged, among other things, that petitioner sustained personal injuries while engaged in the performance of his duties as an employee of Wabash Railway Company, and on that account is a judgment creditor of said Railway Company in the sum of $10,000.00, with interest and costs; and that as owner of said judgment he, on October 29, 1931, under the applicable laws of Missouri, had and still has a lien on all

real property in the City of St. Louis, Missouri, owned by said Railway on and since October 29, 1931 (R. 51-52), and that at the time petitioner recovered said judgment said Railway Company was and still is the owner of real property in the City of St. Louis, Missouri, of the reasonable value of more than $800,000, and that said judgment remains unpaid.

Said petition further alleged that Kuhn, Loeb & Company, an investment banking corporation, is, and for many years has been, the banker for the Pennsylvania Railroad Company; that it also had and exercised control of the Wabash and its financial policies and investments in 1926; that the Pennsylvania Railroad Company conspired and connived with Kuhn, Loeb & Company in a course of conduct whereby the Wabash was caused to, and did, purchase and acquire Lehigh Valley Railroad Company stock; that such stock purchases were made without the knowledge or approval of the Interstate Commerce Commission, and were concealed from the Interstate Commerce Commission by the making of false reports and by the falsification of the books and records of the Wabash; that Kuhn, Loeb & Company collected and received fees, commissions and profits in excess of $1,000,000, and sold to the Wabash Company, at great profit to itself, stocks owned by Kuhn, Loeb & Company; that the foregoing was accomplished by a conspiracy between Kuhn, Loeb & Company and officers and directors of the Wabash, thus alleged to be controlled by Kuhn, Loeb & Company and the Pennsylvania Railroad Company; that the losses accruing to the Wabash Railway Company by said transactions were in excess of $20,000,000; that, although such transactions, course of conduct, and the losses sustained by the Wabash Company, as the result thereof, had, through a congressional investigation, been made generally known to the public, the Wabash Receivers had taken no action to re-

cover moneys lost by the Wabash thereby; that by reason of their failure to take any such action, and because of their aforesaid relationship with the Pennsylvania Railroad Company, the said Receivers are improper persons to act as Receivers of the Wabash, and that their continuance in office as said Receivers is in conflict with the spirit and provisions of Section 77 of the Bankruptcy Act, enacted by Congress as a means of curbing abuses of friendly railroad receiverships and requiring the appointment of a disinterested trustee; that the Pennsylvania has so improperly exercised its control of Wabash as to cause Wabash to suffer great losses and wasting of its assets; that the same interests which caused Wabash to sustain said losses through the mentioned transactions and course of conduct, and "which interests include Kuhn, Loeb & Company, the Pennsylvania Railroad Company, their nominees, and persons under their control," are still in control of matters pertaining to securities of Wabash Railway Company, and have obtained and possessed, and are undertaking to exercise, such powers as will permit them to direct the course of, and policies relating to, any reorganization of Wabash Railway Company; and that "it is only by such remedial legislation, and supervision and exercise of powers of the Interstate Commerce Commission, as are provided for in Section 77 of the National Bankruptcy Act, that a proper accounting on behalf of Wabash Railway and the protection of the creditors of Wabash Railway Company can be had"; that under the circumstances existing the receivership should be terminated, so that thereby there might result the institution of a proceeding for the reorganization of the Wabash, under the provisions of said Section 77 of the Bankruptcy Act; that since the commencement of the receivership there have been practically no proceedings of a constructive nature looking to a final disposition of the action and the ter-

mination of the receivership; that the receivership has become a "nursing" receivership; *that the claim of petitioner is one entitled to priority over the liens of the mortgages and is entitled to present payment as an operating expense;* and prays for an order dismissing and terminating the several receivership proceedings and for its dissolution as to him of the injunctive orders contained in the orders of the Court appointing Receivers (R. 51-77).

The petition of petitioner, Peter J. Carpenter, for leave to file his intervening petition was heard and submitted on August 31, 1938. The Court thereupon entered certain findings of fact (R. 78-83) and an order denying said petition for the following reasons:

"(a) The petition which said petitioner seeks leave to file does not conform to the requirements of Equity Rule No. 37;

(b) The status and classification of petitioner's claim as an unsecured claim which is not entitled to any lien or priority of payment over any other unsecured claim has heretofore been correctly and finally determined in this cause, and said petitioner is now estopped from asserting a claim for preference and priority of payment over the many other unsecured creditors whose claims have been filed and allowed in these proceedings;

(c) The intervening petition which petitioner seeks leave to file states no cause of action in equity, and the granting of leave to file will merely serve to encumber and delay the orderly process of these cases toward a reorganization of the properties of the defendant Railway Company;

(d) The dismissal, as to said petitioner, of the injunctive provisions of the several orders of this Court appointing the receivers in the several constituent causes of this consolidated cause, without a dismissal of the said several causes, would be of no aid or benefit to said petitioner, since all of the properties of the

> defendant Railway Company would remain in the exclusive custody and control of the Court's receivers."

Thereupon, petitioner duly took an appeal to the United States Circuit Court of Appeals for the Eighth Circuit (R. 77-78, 84-99). On May 13, 1939, after due submission, the United States Circuit Court of Appeals for the Eighth Circuit, by Van Valkenburgh, Circuit Judge, rendered its opinion (103 F. [2d] 996-1001; R. 113-123) and decree (R. 123-124) upon petitioner's said appeal, affirming the said judgment and decision of the said District Court, and in its opinion holding:

> 1. That "(a) the statutes and decisions of the State of Missouri did not operate to give priority to the petitioner's claim; that (b) the decisions of the Eighth Circuit Court of Appeals have been consistently against this contention; that (c) the statutes and decisions, or judgment of Indiana and Ohio, assuming petitioner correctly states them, have no extraterritorial effect; and that (d) Subsection (n) of Section 77 of the Bankruptcy Act, as amended, did not apply to equity receiverships (103 F. [2d] 996, l. c. 1000; R. 119-120).
>
> 2. "But apart from whether judgments of this nature normally have, or may have, priority rights over antecedent mortgage liens, we believe appellant is foreclosed by this record from asserting such rights in this action. The court in its conclusions of law found that the status and classification of petitioner's claim had been correctly and finally determined as an unsecured claim, and that the petitioner was estopped from asserting its preference and priority of payment. We think the record fully justifies this finding and conclusion" (103 F. [2d] 996, l. c. 1000; R. 120-121).

thus holding that the trial court rightly held petitioner herein, after the findings of the Special Master were for two years accepted as final and conclusive, estopped from asserting a claim for preference and priority of payment

over the many other unsecured creditors whose claims have been filed and allowed (103 F. [2d] 996, l. c. 1000-1001; R. 121).

3. That it inclined to agree with the trial court that the petition sought to be filed did not conform to the requirements of Equity Rule No. 37, then in force (103 F. [2d] 996, l. c. 1001; R. 122).

4. That (a) the petitioner whose claim has already been filed and its status determined, has no absolute right to file and be heard upon his proposed petition (103 F. [2d] 996, l. c. 1001; R. 121-122); and that (b) denial of the application of petitioner, whose claim had been allowed, to intervene and file a petition for dismissal of injunctive orders was not abuse of the trial court's discretion, since the trial court should consider whether intervention will unduly delay or prejudice adjudication of rights of original parties, and since dismissal of receivers and dismissal of injunctive orders would not aid the judgment creditor without dismissal of the several causes (103 F. [2d] 1001; R. 122-123).

Thereafter, on May 27, 1939, petitioner duly filed his petition for a rehearing in said cause in the Circuit Court of Appeals (R. 125-135). Said petition for rehearing was denied on the 12th day of June, 1939 (R. 137), whereupon, upon motion duly made and filed June 22, 1939 (R. 139), the Circuit Court of Appeals on June 27, 1939, made its order staying the mandate pending a petition to this Court for a writ of certiorari (R. 138).

## QUESTIONS PRESENTED.

In his petition for writ of certiorari the petitioner has set out seven distinct questions (pages 2 and 3 of Petition for Writ of Certiorari and Brief in Support Thereof). It is the respondent's position that the questions presented are correctly stated by the Circuit Court of Appeals in its opinion where it stated (103 F. [2d] 996, l. c. 999; R. 119):

> "The decree of the court, being upon the application of appellant for leave to file his proposed petition, our determination must in effect be limited to a consideration of two questions: (a) is the claim of appellant entitled to priority over the liens of the mortgages in suit and to payment as such; and (b) has appellant the absolute right to file and be heard upon a petition praying, as relief, the preservation and enforcement of his alleged prior lien, the termination of the receivership, and dissolution of the injunctive orders incidental thereto?"

## SUMMARY OF ARGUMENT.

I.

A.

The matters at issue in the within cause were correctly decided by the Circuit Court of Appeals for the Eighth Circuit when it affirmed the order of the District Court denying, on the ground of estoppel, the petition of Peter J. Carpenter, petitioner herein, for leave to file his petition for order terminating receivership of respondent Wabash Railway Company; and dissolving temporary restraining order and injunction.

B.

Petitioner was not entitled to file his intervening petition because it did not comply with Equity Rule 37, governing intervening petitions, and was not in compliance with Rule 24 of the New Federal Rules.

II.

A.

The decision of the Circuit Court of Appeals, in holding the petitioner estopped from not asserting a claim for preference, is not in conflict with the decisions of any other circuit, nor is the Court's decision denying to petitioner leave to file his intervening petition and the relief prayed therein in conflict with any decisions of this Court.

B.

There is no conflict between Bowen v. Hockley, 71 F. (2d) 781 (C. C. A. 4, 1934), and Carpenter v. Wabash Railway Company, 103 F. (2d) 996 (C. C. A. 8, 1939).

## III.

### A.

Section 77 of the Bankruptcy Act, as amended, had and can have no application to petitioner's claim for preference or priority in payment because his rights and the rights of other creditors were fixed as of the date when the receivers were appointed.

### B.

Petitioner's claim when receivers were appointed, when filed, when heard by the Special Master, when allowed by him, when filed with the Clerk of the District Court, upon his application for leave to file his intervening petition, was, under controlling decisions, not entitled to a preference or priority in payment.

### C.

In holding that petitioner's judgment is but a general claim, the courts below have not failed to give effect to the statutes of Missouri, to the applicable decision of the Supreme Court of Missouri, nor to the weight of authority.

## ARGUMENT.

### I.

### A.

**The Matters at Issue in the Within Cause Were Correctly Decided by the Circuit Court of Appeals for the Eighth Circuit When It Affirmed the Order of the District Court Denying, on the Ground of Estoppel, the Petition of Peter J. Carpenter, Petitioner Herein, for Leave to File His Petition for Order Terminating Receivership of Respondent Wabash Railway Company, and Dissolving Temporary Restraining Order and Injunction.**

### B.

**Petitioner Was Not Entitled to File His Intervening Petition Because It Did Not Comply With Equity Rule 37 Governing Intervening Petitions, and Was Not in Compliance With Rule 24 of the New Federal Rules.**

A. The petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit filed herein by Peter J. Carpenter, petitioner, we respectfully submit is without merit and should be denied. The petitioner had ample opportunity to file his claim for preference and priority in payment of his claim against the Wabash Railway Company, but he failed and neglected to do so when he filed his statement of claim on or after the 9th day of June, 1932 (R. 107), and neglected to amend such claim so as to show that he claimed such preference even after the answer of the petitioners filed on August 31, 1932, expressly and specifically pleaded that he was not entitled to any preference or priority in payment (R. 109). Nor did the petitioner claim any preference or priority in payment of his claim in the hearing before the Special

Master on the 26th day of August, 1935 (R. 102-104). Nor was any claim for preference or priority made by the petitioner on the sixth day of January, 1936, when the Special Master announced that "said claim is not entitled to any preference or priority over other general unsecured claims" (R. 104-105). The record shows that the Special Master filed such findings in the office of the Clerk of the District Court on March 7, 1936 (R. 105). Nothing, however, was done by the petitioner to correct the alleged error of the Special Master in determining that such claim of the petitioner was not entitled to preference or priority in payment, until January 26, 1938 (R. 44), when he filed his notice "for leave to file petition for order terminating the receivership of Wabash Railway Company, etc." It thus appears that petitioner took no action which would advise the Special Master or the District Court that he was claiming a preference or priority in payment of his claim between the early part of June, 1932, and the latter part of January, 1938, a period of more than five years and six months. It further appears that petitioner did not attempt to correct the alleged error of the Special Master from March 7, 1936, to January 26, 1938, or for a period of more than one year and ten months. Such inaction, failure and neglect on the part of petitioner to timely and seasonably press his claim for a preference, we respectfully submit, estops and has long estopped the petitioner from alleging and claiming or maintaining that the determination that his claim was not entitled to preference or priority in payment is error. To permit the petitioner to set aside the finding of the Special Master would manifestly be unjust to other claimants who seasonably and timely filed and proved their claims, and would undeniably upset the regular and orderly processes of trial courts and would nullify the provisions of Equity Rule No. 66, which was in effect when petitioner's claim was filed and was in effect when

petitioner's claim was determined, and would invalidate Rule No. 24 of the Rules of Civil Procedure for the District Courts of the United States promulgated by this Honorable Court and made effective from and after September 16, 1938.

Equity Rule No. 66 provides that "the parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed."

And Rule No. 24 of the New Federal Rules referring to intervention of right under subsection (a), and permissive intervention under subsection (b), conditions such right "upon timely application."

Can it, therefore, be reasonably said that petitioner, who delayed in asserting his claim for a period of five and one-half years from the date of the filing of his claim and for a period of one year and ten months after the allowance of his claim, has made "timely application" for a rehearing or redetermination which he now asks this Court to grant him?

B. Equity Rule No. 37 provides as follows:

> "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

The intervening petition which petitioner proposed to file was in disregard of this rule in that it was not "in subordination to nor in recognition of the propriety of the main proceeding," but, on the contrary, sought the discharge of the Receivers and the dismissal of the main proceeding in order that petitioner might be enabled to pro-

ceed against the Wabash Railway Company under Section 77 of the Bankruptcy Act.

There can be no question that Rule 37 was in full force and effect when plaintiff sought to file his intervening petition on January 26, 1938, and continued in effect when the District Court denied his application to file his petition on August 31, 1938 (R. 78), because the new Federal Rules, under the express provisions of Rule 86 of said Rules, were not effective until September 16, 1938. But, irrespective of the application of the new Federal Rules, the Court's action in denying to petitioner leave to file his intervening petition was correctly decided because Rule 24 of said Rules provides that such application must be "timely."

II.

A.

**The Decision of the Circuit Court of Appeals, in Holding the Petitioner Estopped From Not Asserting a Claim for Preference, Is Not in Conflict With the Decisions of Any Other Circuit, Nor Is the Court's Decision Denying to Petitioner Leave to File His Intervening Petition and the Relief Prayed Therein in Conflict With Any Decisions of This Court.**

B.

**There Is No Conflict Between Bowen v. Hockley, 71 F. (2d) 781 (C. C. A. 4, 1934), and Carpenter v. Wabash Railway Company, 103 F. (2d) 996 (C. C. A. 8, 1939).**

A. The petitioner, in the second point relied on for the allowance of the writ (page 10 of Petitioner's Petition for Writ of Certiorari and Brief in Support Thereof), and in point III of his argument (pages 26 and 27 of Petitioner's Petition for Writ of Certiorari and Brief in Support

Thereof) contends that the decision of the Circuit Court of Appeals on the question of estoppel is in conflict with the decisions cited by him. We shall discuss each of these decisions in the order in which they are cited.

The Court, in Holman v. Cross, 75 F. (2d) 909, merely held that the District Court was not bound by the conclusion of law of the Master appointed by him. The cited case is not on its facts in point with the case at bar. Even so, we find no fault with the conclusion of law therein expressed, but fail to see how it in any way aids petitioner.

In the case of Lone Star Gas Co. v. City of Fort Worth, 93 F. (2d) 584, the Circuit Court of Appeals held that the District Judge is not bound by the Master's report. It is not to be presumed in the case at bar that, because the District Court arrived at the same conclusion as the Master, he was overly bound by the Master's report. Neither the District Court nor the Circuit Court of Appeals, in their decisions, indicated that they felt themselves bound by the Master's report; but, on the contrary, held, after examining the record, that the petitioner was estopped to assert a claim for preference in his petition for leave to file an intervening petition.

The petitioner also cites the case of Childs v. County Trust Company of New York, 70 F. (2d) 1012. In that case the Circuit Court of Appeals affirmed without opinion a decision of the District Court, which, among other things, held that the District Court must review the facts where the reference is to hear and report on claims. This is exactly what the Court did in the case at bar at the time it refused the petitioner leave to file his intervening petition.

The petitioner also contends that the decision in the case at bar is in conflict with the decision in the case of Employers' Liability Assurance Corporation v. Astoria Mahogany Co., 6 Fed. (2d) 945. That case merely held

that delay in filing a claim may, under certain circumstances, be excusable, but in the case at bar there is more than just a question of delay in filing a claim. In the case at bar the petitioner was permitted to file his claim, and it was allowed. As we have pointed out in I, supra, however, petitioner did not ask for a preference when he filed his claim, did not contest Receiver's answer alleging that petitioner was not entitled to any preference, made no claim for a preference at the hearing before the Special Master, did not except to the report of the Special Master, which accorded petitioner no priority, and did not except to the filing of said report. It is apparent that the decision of the Circuit Court of Appeals holding that under these facts the petitioner was estopped is not in conflict with the decision of the Fifth Circuit, which holds that the District Court must, where it does not appear that prejudice would result to diligent creditors, allow a creditor to file his claim even though the time for filing has passed.

The petitioner also cites the case of People v. Hopkins, 18 F. (2d) 731. In that case the application for the allowance of the claim of the sovereign state for unpaid taxes was made in eight days after a default order had been entered that no taxes were due. The Court pointed out that the State Tax Commission did not receive notice of the default order until two days before it filed its application for the payment of taxes. Upon those facts the Court held that the state was not barred. These facts are, of course, wholly dissimilar to the facts in the case at bar, because in this case the petitioner had notice of all proceedings from the very inception of his claim.

The petitioner in his petition for writ of certiorari has stated under his third reason relied on for the allowance of the writ (p. 11, Petition for Writ of Certiorari and Brief in Support Thereof) that the decision of the Circuit

Court of Appeals is in conflict with the cases of Metropolitan Railway Receivership, 208 U. S. 90, 52 L. Ed. 403, 28 Sup. Ct. 210, and Milwaukee and Minnesota Railroad Company v. Soutter, 69 U. S. 510, 17 L. Ed. 900. Neither of these cases, we respectfully submit, is at all similar on its facts to the case at bar and there is nothing in either of them which is in conflict with the decision of the Circuit Court of Appeals. The petitioner apparently reached the same conclusion because he does not attempt to argue the point in his brief, nor to point out to the Court wherein the conflict lies.

B. There is no real conflict between the Fourth and Eighth Circuit Courts of Appeals as to whether an employee's judgment for personal injuries is a general or preferred claim. The only case in the Fourth Circuit Court of Appeals in which the question was squarely presented followed the rule laid down in the Eighth Circuit. Hampton v. Norfolk & W. R. Co., 127 F. 662 (C. C. A. 4, 1904), a case which to date has not been overruled and whose authority cannot be said to have been shaken by the Hockley case. The important—in fact, the controlling—difference between the Hockley case and the Carpenter and Hampton cases is that the latter cases did not involve statutes, while the Hockley case was based upon a statute. Other distinctions could easily be made between the Hockley case and all the other cases on the subject, but in the interest of brevity we will content ourselves with referring this Court to the views of the Eighth Circuit Court of Appeals and the Second Circuit Court of Appeals on this subject.

Judge Learned Hand, speaking for an undivided Court on that particular question (In re New York, N. H. & H. R. Co., 92 F. [2d] 428 [C. C. A. 2, 1937]), said (l. c. 430):

"In Bowen v. Hockley (C. C. A.), 71 F. (2d) 781,

94 A. L. R. 856, the Fourth Circuit did indeed establish an exception in the case of compensation awards to employees, though even then only to the extent of charging upon income such installments as fell due during the receivership. The reasoning on which this rested was that, as the employee's labor was necessary to the operation of the road, his compensation, like his wages, was for the benefit of the lienor. It may be doubted whether compensation stands like wages in the sense that doubts as to its priority in insolvency would even remotely affect the willingness of the men to continue to work; but with that we need not concern ourselves."

Circuit Judge Faris, while delivering the opinion of the Court in Pitcairn v. Fisher, 78 F. (2d) 649 (C. C. A. 8, 1935), stated, l. c. 653:

"The case of Bowen v. Hockley (C. C. A.), 71 F. (2d) 781, 94 A. L. R. 856, is urged and greatly relied on by appellee. This was a case wherein more than a year prior to receivership the beneficiary had been awarded compensation for the death of her husband by the State Industrial Accident Commission of the State of Maryland. The award was made under the provisions of the Maryland Workmen's Compensation Act. It was for the sum of $18.00 per week, for a total of some 277 weeks. Under the award, payments had been made weekly until the receiver was appointed. He refused to make further payments, and the beneficiary brought suit. The Court of Appeals of the Fourth Circuit held that such payments should be made pending the receivership. It was, however, pointed out in the opinion that there are three methods of securing payment of awards under the Maryland local law. First, insurance in the state accident fund; second, insurance by private corporate insurers; and, third, assumption of the risk by the employer, when seemingly amply solvent. In the Bowen Case, supra, a fourth method, seemingly deemed a compliance with

the third method, was used. That is, a bond to secure the payment of all such awards was given by the employer. This bond it appeared was not sufficient to cover all outstanding awards, and the receiver of the employer was held liable.

"No reference is made in the Bowen opinion to the Veatch Case, the Riley Case, both supra, or to any other case we cite above. * * * *Clearly, then, the Bowen Case rode off on a theory of insurance under the local statute, for the court designate the employer as a 'self-insurer' under the third alternative above referred to.*"

See, also, 90 A. L. R. 664-668.

The petitioner, however, may point to the cases referred to in 90 A. L. R. 668-669 as sustaining the petitioner in his contention that a conflict exists between the jurisdictions. A glance at those cases, however, will clearly show that the decisions contra the views we have expressed either arose in state courts or have arisen in a Federal Court, while applying a state statute. The decisions contrary to the views expressed in the Carpenter case involved state statutes, while the decision in accord with views expressed in the Carpenter case and other cases considered the same question, independently of any controlling statute. We further submit that the cases giving the injured employee a preference are unsound and are based on judicial legislation, a function better and more wisely left to the discretion of the legislative bodies of the several states in which such question arises or is likely to arise.

In addition thereto it is not inappropriate to state that it is beyond the scope of the authority of this Court to resolve conflicts in the decisions of the several state courts where questions of local law are involved. However, it may be argued that it is within the federal power to regulate railroads engaged in interstate com-

merce. That unquestionably is true, but at the time when petitioner was injured, and at the time when his judgment claim was allowed as an unsecured claim, Congress did not see fit to control and regulate the scope of equity receivership.

III.

A.

**Section 77 of the Bankruptcy Act, as Amended, Had and Can Have No Application to Petitioner's Claim for Preference or Priority in Payment Because His Rights and the Rights of Other Creditors Were Fixed as of the Date When the Receivers Were Appointed.**

B.

**Petitioner's Claim, When Receivers Were Appointed, When Filed, When Heard by the Special Master, When Allowed by Him, When Filed With the Clerk of the District Court, Upon His Application for Leave to File His Intervening Petition, Was, Under Controlling Decisions, Not Entitled to a Preference or Priority in Payment.**

C.

**In Holding That Petitioner's Judgment Is but a General Claim, the Courts Below Have Not Failed to Give Effect to the Statutes of Missouri, to the Applicable Decision of the Supreme Court of Missouri, Nor to the Weight of Authority.**

A. Section 77 of the Bankruptcy Act, as now amended, is not applicable to petitioner's claim for preference or priority in payment, because his rights were fixed either when he obtained his judgment in 1931 or in 1934 (R.

105), at a time long prior to the enactment of Section 77 of the Bankruptcy Act, as now amended.

It is thus held in In re K-T Sandwich Shoppe of Akron, 34 F. (2d) 962 (D. C., N. D., Ohio, E. D. 7-8-39), l. c. 963:

> "*It is a general rule that* a receiver acquires no greater rights in the property put into his possession by the appointing court than the debtor had, and that the Receiver takes and holds such property subject to such equities and liens as exist, and to which the property was subjected in the possession of the debtor, or the person out of whose hands it was taken, when the receiver was appointed; but, except as to such liens as existed at the time of his appointment, such receiver generally holds the property for the benefit of general creditors under direction of the court, and *no lien can be acquired after the receiver has taken possession of the res.* Horn v. Pere Marquette R. Co. (C. C.), 151 F. 626, 633; H. K. Porter Co. v. Boyd (C. C. A.), 171 F. 305, 312 et seq.; T. L. Smith Co. v. Orr (C. C. A.), 224 F. 71; Shooters Island Shipyard Co. v. Standard Shipbuilding Corporation (C. C. A.), 293 F. 706, 716; Cornelius v. C. C. Pictures, Inc. (D. C.), 296 F. 487."

To the same effect is Illinois Central R. Co. v. United States Fidelity & Guaranty Co., 87 F. (2d) 121 (C. C. A. 5, 1936). The petitioner in that case, as the petitioner in the case at bar, contended that Section 77 of the Bankruptcy Act, as amended, was applicable to an equity receivership. The Court, in rejecting this contention, said (l. c. 123):

> "The above statute applies expressly to proceedings in bankruptcy, and this is an equity receivership (Clough v. Superior Equipment Corporation, 18 Del. Ch. 202, 157 A. 306, 309), but, aside from these facts, the amendatory act relating to reorganization of railroads had not been passed when the receiver in this case was appointed. *Rights of petitioners were fixed as of the date the Receiver was appointed. In re U.*

*S. Security Co.*, 321 Pa. 276, 184 A. 106; *In re K.T. Sandwich Shoppe of Akron* (D. C.), 34 F. (2d) 962, 963."

In view of the fact that it was unquestioned law that petitioner's judgment claim was not entitled to priority over other general unsecured claims at the time when Receivers were appointed, and at the time when petitioner's claim was presented, heard and allowed, Section 77 of the Bankruptcy Act, as now amended, cannot lawfully change the status of petitioner's claim from an unsecured claim to a claim entitled to preference or priority in payment. To do so would unfairly and prejudicially affect the rights of diligent creditors whose claims have long since been allowed and classified.

B. A careful examination of the cases leads us to believe that the annotator in 90 A. L. R. 664-665 is more than justified in stating that:

> "*The Federal Courts, apparently without exception*, and some state courts, *hold that claims* for damages to person or property arising from the operation of a railroad before the appointment of a receiver are not entitled to priority over a pre-existing mortgage."

As a matter of fact, we have diligently and carefully searched in vain for a case decided by any District Court or any Circuit Court of Appeals that holds that an employee injured while in the performance of the duties of his employment was entitled to preference or priority in payment of his claim or judgment. The history of the decisions on this subject is briefly and concisely stated by Judge Learned Hand in the case of In re New York, N. H. & H. R. Co., 92 F. (2d) 428 (C. C. A. 2, 1937), l. c. 430:

> "In Burnham v. Bowen, 111 U. S. 776, 783, 4 S. Ct. 675, 679, 28 L. Ed. 596, Chief Justice Waite concluded

by saying that only those expenses should have priority which were 'for the benefit of mortgage creditors,' language which has been accepted several times since. St. Louis etc. Ry. Co. v. Cleveland etc. Ry. Co., 125 U. S. 658, 673, 674, 8 S. Ct. 1011, 31 L. Ed. 832; Virginia & Alabama Coal Co. v. Central R. R. & Banking Co., 170 U. S. 355, 367, 18 S. Ct. 657, 42 L. Ed. 1068; Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 285, 286, 20 S. Ct. 347, 44 L. Ed. 458; Gregg v. Metropolitan Trust Co., 197 U. S. 183, 187, 25 S. Ct. 415, 49 L. Ed. 717. It was upon the basis of this gloss upon the original text that, when the case arose of a claim for injuries, the Eighth Circuit denied priority. (St. Louis Trust Co. v. Riley [C. C. A.], 70 F. 32), a decision which has been followed in three other circuits and was unquestionably the law when section 77 was passed. Farmers' Loan & Trust Co. v. Northern Pac. R. R. Co. (C. C. A. 9), 79 F. 227; Hampton v. Norfolk & W. R. R. Co. (C. C. A. 4), 127 F. 662; Pennsylvania Steel Co. v. N. Y. City Ry. Co. (C. C. A. 2), 216 F. 458."

An investigation of the cases subsequent to the above-cited cases discloses no federal court decision involving receivership cases where an injured employee's claim was adjudged to be entitled to preference or priority in payment. In view of the above, it is too clear for any argument that the Circuit Court of Appeals correctly decided the questions which the petitioner herein now asks this Court to rehear and redetermine anew.

C. Point II, pages 24-26 of petitioner's brief, maintains that the Court's judgment was in disregard of section 1104, now superseded by section 1103, as amended, and section 1105 of the Revised Statutes of Missouri 1929, and in conflict with a controlling Missouri decision and the weight of authority.

Whether the petitioner had a judgment lien against

Missouri real estate at the time he filed his claim in 1932, which might have entitled him to priority over simple non-judgment claimants, is not material to the decision of this case, because the petitioner's real contention is that *his claim is entitled to priority over the liens of the mortgages and to payment as such.* If that were not petitioner's contention there would be no need for him so strenuously to seek to invoke Subsection (n) of Section 77 of the Bankruptcy Act (Point I, pages 17-20, 22-24, of petitioner's brief), a law wholly inapplicable to receivership proceedings at the time petitioner's appeal was determined by the Circuit Court of Appeals (103 F. [2d] 996, l. c. 1000; R. 120).

But the District Court's holding (and the Circuit Court's approval of it), when viewed in its true light and under the circumstances obtaining in the instant cause, was correct.

It is well settled that:

> "The priority of mortgage and judgment liens is determined at common law by the date of their acquisition, the first in time being the first in right. A mortgage recorded prior to an entry of judgment which is a lien upon the property takes precedence of the judgment lien, and a foreclosure of the mortgage, or the sale of the property under a power in the mortgage, defeats the judgment lien; * * *." Jones on Mortgages, Eighth Edition, pages 772-773, § 577.

To the same effect is 34 C. J. 591, §903, and 34 C. J. 605, §905, and note 4, p. 606.

> 34 C. J. 591.
>
> [§903.]. I. *Estate or Interest Affected by Lien; 1. In General.* "The lien of a judgment attaches to the precise interest or estate which the judgment debtor has actually and effectively in the land, and only to such interest; the lien cannot be made

effectual to bind or to convey any greater or other estate than the debtor himself, in the exercise of his rights, could voluntarily have transferred or alienated.[55]"

[55] Mo. Union Bank v. Manard, 51 Mo. 548.

34 C. J. 605.

[§925.]. 2. *Between Judgment and Conveyances and Other Liens*—a. *Prior Conveyances Generally.* "Since the lien of a judgment attached only to the actual interest of the debtor in the land, the general rule, in the absence of a statute to the contrary, and subject to registration statutes prescribing the effect of unrecorded conveyances and mortgages upon the rights of purchasers and creditors, is that *a judgment lien is subordinate to prior conveyances and encumbrances and all existing liens and equities in favor of third persons.*[4]"

[4] Mo. Bryan v. McCaskill, 284 Mo. 583, 225 S. W. 682; Jones v. Levering, 116 Mo. A. 377, 91 S. W. 980.

## Conclusion.

In conclusion we respectfully submit that the petitioner is not entitled to the issuance of a writ of certiorari in this case because the decision of the Circuit Court of Appeals, in affirming the District Court's denial of leave to the petitioner to file and be heard upon his intervening petition, was correct on the following grounds:

1. That the petitioner's claim was not a preferred claim on the theory that it was an operating expense of the Railroad Company.

2. That Subsection (n) of Section 77 of the Bankruptcy Act, as amended, had no application in equity receivership proceedings.

3. That the proposed petition of intervention was in dis-

regard of provisions of Equity Rule 37 and Rule 24 of the Federal Rules of Civil Procedure.

4. That the petitioner was estopped to assert his claim by way of intervening five and one-half years after the filing of his claim.

5. That the petitioner has wholly failed to demonstrate that the decision in the instant case is in conflict with the decisions in any other circuit or in disregard of the holdings of this Court.

We respectfully further submit that the instant case is not of such great general importance and public interest as to justify the issuance of the writ.

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FILE COPY

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY, Respondents.

## BRIEF

**Of Central Hanover Bank & Trust Company, Trustee Under the First Mortgage of the Wabash Railroad Company, in Opposition to Petition for Writ of Certiorari.**

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### JURISDICTION OF THE COURT.

This Court unquestionably has the power to issue a writ of certiorari to review any decision of the Circuit Court of Appeals if it sees fit to do so. The real issue is whether petitioner has set forth any grounds which would warrant the issuance of a writ of certiorari by this Court in the exercise of its discretion. No one of the authorities cited

on page 14 of the petitioner's supporting brief has even a remote tendency to show that petitioner is entitled to the issuance of a writ of certiorari. On the contrary, there is no conflict shown between the decision of the court below and that of any other Circuit Court of Appeals; nor is the question raised by the petition one of general public interest or great importance. The writ should therefore be denied.

## STATEMENT OF THE CASE.

There are certain vital omissions from the petitioner's "Summary Statement of Matter Involved" which serve to give a misleading picture of the issue presented to the District Court and to the Circuit Court of Appeals on review. Petitioner correctly states (Petitioner's Statement, p. 5) that the petitioner's claim came on for hearing before the Special Master on August 26, 1935, and on January 6, 1936 (R. pp. 102 to 105). Petitioner neglects to state that at these hearings before the Special Master petitioner's claim, based upon his judgment for damages for personal injuries, was allowed as a general unsecured claim by consent of all parties, including petitioner, who was represented by counsel (R. pp. 102 to 105; further see Opinion of Circuit Court of Appeals p. 998; R. pp. 115, 116, 117).

It plainly appears that petitioner at the hearing before the Master offered no evidence other than a certified copy of the judgment and a bill for costs. It further appears that when (R. pp. 104, 105) the Special Master announced in the presence of counsel for the petitioner that the claim would be allowed as a general unsecured claim, no opposition to such a ruling was voiced by petitioner's counsel, despite the fact that counsel for petitioner was present at the time of the announcement. The record plainly shows that petitioner then asserted no more than

a general claim and by words and conduct consented to the report made by the Special Master.

The petitioner's statement calls attention to the fact that petitioner had received no notice of the filing of the Special Master's report, and further points out that at the time of the hearing the report had been neither approved nor affirmed (Petnr's Stafement p. 5). Petitioner fails to state, as the record shows, that no notice of the filing of the report was given to him, because the order of Court appointing the Special Master and authorizing him to hear claims (R. pp. 22-23) distinctly provided for notice by the Special Master only "before settling his report in any contested case."

## ARGUMENT.

In drafting his brief and setting forth the "Reasons Relied on for Allowance of the Writ" (Pet. p. 10) the petitioner has chosen to ignore the fundamental question decided by the Circuit Court of Appeals in its opinion below and to brief and argue instead a number of subsidiary propositions of law. Some of these propositions have some relevancy to the fundamental questions involved on the appeal, but none are decisive in the case.

Prior to ruling on the various issues of law discussed in the petition for certiorari it was necessary for the Circuit Court of Appeals first to determine whether the District Court's denial of appellant's application for leave to intervene was a reviewable order.

Under controlling decisions of this Court, such as **Credits Commutation Co. v. U. S.**, 177 U. S. 311, 44 L. Ed. 783, the question of the allowance of an intervention by the trial court was a matter addressed solely to the discretion of the trial court, and the trial court's exercise of discretion in denying leave to intervene was not subject to review on appeal unless the denial of intervention would be "a practical denial of certain relief to which the intervenor is fairly entitled and which he can only obtain by intervention."

The Circuit Court of Appeals enunciated the various principles of law, which the petitioner attacks, in the course of its examination of the proceedings below, with a view to determining whether or not the trial court's denial of intervention was an appealable order within the rule announced by this Court in the **Credits Commutation** case, supra. Having concluded (see opinion of Court of Appeals p. 1001; R. pp. 121 to 123) that the appellant's claim did not present a case "where a denial of the right to

intervention would be a practical denial of certain relief," the Court quite properly affirmed the trial court's decree.

The question of whether an absolute right of intervention existed or whether the District Court's order denying leave to intervene amounted to no more than an exercise of judicial discretion which is not subject to review on appeal, was, if determined adversely to the appellant's contentions, determinative of the cause, regardless of the nature of the questions of substantive law which appellant sought to raise by his appeal. The general rule precluding appellate review of orders denying leave to intervene and the limited scope of the exception thereto are concisely stated in **Credits Commutation Case**, supra, as follows:

> "Such an order (denying leave to intervene) not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. * * * It is doubtless true that cases may arise where the denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court to which a third party asserts some right which will be lost in the event he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief. The cases at bar, however, are not of that character."

It is plain from the record in this cause that petitioner had no absolute right to intervene for the very simple reason that whatever rights petitioner had could have

been adequately protected without the necessity of any formal intervention as a party to the cause.

The trial court's order appointing the Special Master (R. pp. 22, 23) authorized the Master to investigate, determine and report upon any and all claims against the receivership estate. No reason why petitioner could not have asserted any claim of preference to which he may have been entitled, by the filing of a claim before the Master, was suggested in the briefs below, nor is any shown in the petition for writ of certiorari.

The Circuit Court of Appeals concluded (and we believe correctly) that no right of preference existed, but assuming, for the sake of argument, that petitioner was entitled to a right of preference, an intervention as a party to the cause was wholly unnecessary in order to enable him to assert it.

No matter what view might be taken of petitioner's (claimant's) substantive rights as a judgment creditor of the Wabash Railway Company, those rights could have been sufficiently protected without encumbering the cause with an unnecessary intervention. It is a matter of common knowledge that claims for damages outstanding against a large railroad corporation are usually numerous. The Court's orders appointing the Special Master and authorizing him to hear claims were designed as a reasonable means for giving full relief to such creditors without hopelessly encumbering the proceedings by allowing a special intervention to each claimant. Since the Court had through this means afforded the petitioner a full, adequate and complete remedy for the assertion of his rights, intervention was neither necessary nor indispensable to the protection of any substantive right of the petitioner, and the trial court's action in denying leave to intervene amounted to no more than an exercise of judicial discretion, which is not subject to appellate review.

These issues, not discussed in the appellant's petition for certiorari, were determinative of the cause. We respectfully submit that the opinion of the Circuit Court of Appeals correctly follows the rules of law laid down by this Court in **Credits Commutation v. United States**, supra, and should not be disturbed by the issuance of a writ of certiorari.

## NO CONFLICT WITH A DECISION OF ANY OTHER CIRCUIT COURT OF APPEALS IS SHOWN BY PETITIONER.

The petitioner first asserts under point I that the decision of the Circuit Court of Appeals in this cause was in conflict with that of the Fourth Circuit in the case of **Bowen v. Hockley et al.**, 71 Fed. (2d) 781, l. c. 784, 786. In the first place the claim considered by the Court in **Bowen v. Hockley**, supra, was one based upon an award by a Workmen's Compensation Commission under a State Workmen's Compensation Act, whereas petitioner's claim was based upon a judgment rendered in a common-law action for damages for personal injuries. This difference is hardly eliminated by petitioner's grandiloquent assertion that the differences between such an award and a personal injury judgment are immaterial.

More fundamental even than this, however, was the fact (ignored in petitioner's argument) that the case of **Bowen v. Hockley**, supra, does not involve the question of the allowance of preference even to a Workmen's Compensation award over the lien of a prior recorded mortgage. Judge Parker's opinion carefully points out (l. c. 782) that the appointment of receivers was made in a suit brought "by a general creditor and stockholder." No reference to the existence of any outstanding bonds secured by the lien of a prior mortgage is made in any part of the opinion,

but, on the contrary, the opinion refers (l. c. 785) to the preservation of the business "for stockholders and creditors." There can hardly be any conflict between a ruling that a personal injury claim is not entitled to preference over the lien of a prior recorded mortgage of a railway company and a ruling that a Workmen's Compensation award is entitled to preference over the claims of stockholders and unsecured creditors in the receivership of an industrial corporation. The lack of similarity between the two situations is obvious.

Under point II of petitioner's "Reasons" (p. 10), he asserts that the ruling of the court below to the effect that petitioner was foreclosed from asserting any rights of preference by his consent to the allowance of his claim as a general unsecured claim, is in conflict with various decisions of other Circuit Courts of Appeal. We will discuss the opinions in the order in which they appear in petitioner's "Reasons."

The opinion of the court below is not in conflict with the decision in **Holman v. Cross**, 75 Fed. (2d) 909 (C. C. A. 6), because the petitioner (Carpenter) not only failed to except to the Master's report, but also consented to the allowance of his claim as a general claim at the hearing before the Special Master. This second factor, which was not present in the case of **Holman v. Cross**, supra, sufficiently distinguishes the two cases. The Circuit Court of Appeals' finding is based upon the additional fact that the claimant consented to the allowance of his claim as a general unsecured claim, as well as the fact that no exceptions were filed.

The decision of the Circuit Court of Appeals for the Fifth Circuit in **Lone Star Gas Company v. City of Fort Worth**, 93 Fed. (2d) 584, 585, involved the question of the weight to be given the conclusions of fact of a Special Master when the report is considered on review after ex

ceptions duly filed. The case contains no discussion of the effect of the allowance of a claim by consent, nor of the effect of a failure to except to a finding of a Special Master.

The opinion in **Childs v. County Trust Co. of New York,** 6 Fed. Supp. 821, affirmed 70 Fed. (2d) 1012, relates to the question of whether upon review, after exceptions duly filed, the findings of fact of the Special Master are conclusive, if supported by any substantial evidence. Their relevancy to the issue determined by the Circuit Court of Appeals is not apparent.

The decision of the Circuit Court of Appeals for the Second Circuit in **Employer's Life Assurance Assn. v. Astoria Mahogany Co.**, 6 Fed. (2d) 945, and **People etc. v. Hopkins et al.**, 18 Fed. (2d) 731, both involved the question of whether a claim is barred by a failure to file within the time fixed for filing claims in the absence of substantial resulting prejudice to the receivership estate. This question is obviously not the same as that involved in the case at bar.

Under point III petitioner cites two decisions of this Court with which the decision below is asserted to be in conflict. In the first of these, cited as "In re Metropolitan Railway Receivership, 208 U. S. 90-112," and styled "**In the Matter of Francis S. Reisenberg et al.,**" in 52 L. Ed. 403, the holding in the case is not even remotely in point. The petitioner in that case had filed an original application for leave to file a petition for a mandamus, directed to one of the Circuit Judges of the Second Circuit, commanding him to dismiss the receivership proceedings below and to vacate the injunction issued by the trial court. The actual holding of the Court was to the effect that the receivership appointment should be sustained and the petitions dismissed. The only portion of the opinion upon

which petitioner might place any reliance is some language in the concluding paragraph, which is as follows (l. c. 413 L. Ed., 112 U. S. Rep.):

> "The orders appointing the receivers and giving them instructions are most conservative and well calculated to bring about the earliest possible resumption of normal conditions when those who may be the owners of the property shall be in possession of and operate it. We have no doubt, if unnecessary delays shall take place, the court would listen to an application by any creditor, upon due notice to the receivers, for orders requiring the closing of the trust as soon as might be reasonably proper, or else vacating the orders appointing the receivers.
>
> "The rules are discharged and the petitions dismissed."

There is no conflict between this language and the holding of the Circuit Court of Appeals. The language above indicates merely that the trial court would in the first instance hear an application for intervention. The Circuit Court of Appeals in its opinion below did not in any way dispute this principle, but on the contrary held that where the trial court in the exercise of its discretion had determined that an intervention should not be allowed, its ruling was not subject to review on appeal. There is nothing in the language of this Court in the Reisenberg Case to the contrary.

The second authority relied upon is **Milwaukee & Minnesota R. R. Co. et al. v. Soutter**, 69 U. S. 510, 17 L. Ed. 900. This opinion is not in conflict with the holding of the Circuit Court of Appeals, but supports it. The Court states, l. c. 521 U. S. Rep., 904 L. Ed., that as a general rule "the appointment and discharge of a receiver are ordinarily matters of discretion in the Circuit Court with which this Court will not interfere." In the Soutter Case

the debtor corporation filed a petition in which it offered to pay all the money due on the mortgage under which foreclosure proceedings had been instituted, and requested that upon such payment an order be made discharging the receiver and returning the road to the possession of its owners. This Court held that the facts stated amounted to an exception to the general rule, and that a refusal to grant the order upon payment of the balance due was reversible error. There being no facts in this case at all similar to the peculiar facts involved in the Soutter Case, the Circuit Court of Appeals properly followed the general rule recognized in the Soutter Case, and refused to review the District Court's exercise of discretion.

## THE ISSUES PRESENTED BY THE PETITION FOR CERTIORARI ARE OF NO GENERAL IMPORTANCE.

Under point IV petitioner alleges two grounds which are apparently considered to be a basis for the allowance of a writ of certiorari, because of the importance of the questions which the petitioner believes to be involved. Under point (a) petitioner asserts that the "curbing of friendly relationship abuses will be greatly impaired if 'any creditor, irrespective of rank, may be denied the right to remove or discharge receivers who are unfit, unqualified and not disinterested.'" Petitioner asserts that this presents an issue which has never been settled by this Court. The trial court which appointed the receivers and was familiar with the proceedings, in the exercise of its judicial discretion concluded that the allowance of an intervention by the petitioner would merely serve to delay the orderly processes of reorganization in the cause.

The Circuit Court of Appeals (see Opinion R. pp. 122, 123) agreed with this conclusion.

The primary question raised was whether the District Court's denial of the intervention was an appealable order, and this Court's opinion in the **Credits Commutation Case**, supra, was a definite ruling upon that question.

Finally, under point IV (d) petitioner argues that this Court should determine whether a "due observance of the spirit and purpose" of Section 77 of the Bankruptcy Act, as amended, would require that the same limitations on eligibility prescribed in section 77 for trustees to be appointed in a reorganization proceeding, should also apply to an appointment of receivers in an equity receivership. The purported question thus stated has so little substance that it hardly merits consideration.

Section 77 (c) (1) of the Railroad Reorganization Act refers exclusively to the appointment of trustees in proceedings under Section 77 of the Bankruptcy Act. Throughout the Railroad Reorganization Act, wherever any of its provisions are intended to have any application to receivership proceedings, as well as to bankruptcy proceedings, the intention is expressed specifically. For example, Section 77 (p) of the Railroad Reorganization Act, which places certain limitations upon the solicitation of proxies, is expressly made applicable "during the pendency of proceedings under this section or of receivership proceedings against a railroad corporation in any state or federal court." Subsection (n) of the Railroad Reorganization Act as originally enacted provided for a right of preference only in favor of injured employees "in proceedings under this section." Recognizing that the act was inapplicable to equity receiverships except when it was made applicable by specific reference thereto, Congress, on August 11, 1939, amended subsection (n) so as to provide for the preference of such claims both "in proceedings under this section" and "in equity receiverships of railroad cor-

porations now or hereafter pending in any court of the United States."

The incongruity of haphazardly applying provisions of the Railroad Reorganization Act, which was enacted by Congress in the exercise of its bankruptcy powers, to equity receiverships, is obvious. We are unable to understand how anyone could conclude that procedural provisions of the Railroad Reorganization Act have any application to an equity receivership. The text of the act itself lends no support to the idea. We see no reason why this Court should grant a writ of certiorari in order to decide a question which is reasonably obvious on the face of the Railroad Reorganization Act.

The petitioner's fundamental contention in its original petition is that the provisions of Subsection (n) of Section 77 of the Bankruptcy Act, as amended on August 27, 1935, should be applicable to a judgment in an equity receivership even though the section itself is by its terms expressly made applicable only to proceedings "under this section" (Section 77 of the Bankruptcy Act). We have previously pointed out that whenever Congress intended for any portion of the Railroad Reorganization Act to be applicable to equity receiverships, the intention was expressed in clear language. A comparison of subsection (n) of section 77, as amended August 27, 1935, with subsection (p) of the same section of the act, plainly indicates that subsection (n) was made applicable only to bankruptcy proceedings under section 77 in contrast to equity receiverships.

Subsection (n) was amended by Congress on August 11, 1939, to provide as follows:

> "In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corpo-

> ration, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds executed by sureties without security, for and in any action brought against such railroad corporation or trustee appointed pursuant to this section, shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad * * *."

The amendment was made by Congress after the Circuit Court of Appeals rendered its decision and, of course, was not considered by the Court. When and if the question of the applicability of subsection (n), as amended August 11, 1939, is raised in a proper proceeding, the applicability of the section to prior equity receiverships in which the status of claims for personal injuries has already been determined long prior to the enactment of the amendment can be decided. The Court can also decide whether the amended section if applicable would operate to deprive the holders of bonds secured by the lien of a mortgage recorded prior to the act of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

These, however, are not the issues which appellant seeks to raise in his original petition for writ of certiorari. His petition, rather, seeks to raise the question of the applicability of the old subsection (n) to equity receivership proceedings in contravention to the express terms of the section. The enactment of a new amended section automatically eliminates the possibility of such a question arising in the future in other receiverships, because as to such subsequent receiverships the question involved will be the applicability and constitutionality of the new section rather than the petitioner's purported construction of the

old, superseded section. It is obvious, therefore, that the question which petitioner seeks to raise by his original petition is one which in the nature of things is peculiar to this particular case, and is not and cannot be of any public interest or any great importance as a matter of general law in the interpretation of the Bankruptcy Act.

By amended and supplemental brief petitioner calls attention to the enactment of the amendment of subsection (n). Assuming, without citation of authorities or argument, that the amendment creates a preference in favor of petitioner's claim, he urges this as an additional ground for the issuance of a writ of certiorari. When the case was tried and decided below there was no way of anticipating the enactment of the amended section. The record below was made up with a view to establishing the facts necessary for a determination of the issues raised by the petitioner's application for leave to intervene under the law as it then stood. Additional facts with reference to the situation existing in the receivership, and with reference to the existence and prior recording of the various mortgages on the line of the railway company, as well as other matters, should be established and shown by the record before any court will be in a position to determine whether the amended section is applicable to these receivership proceedings and to the claim of the petitioner, Carpenter, and whether, if applicable, the amendment is valid. To proceed to give effect to what petitioner claims to be the proper construction of the amended subsection without first having these matters before the Court for consideration, would be obviously unfair to the rights of these respondents, and to other creditors whose liens are secured by prior recorded mortgages.

Respondents, therefore, submit that the applicability and constitutional validity of the amended subsection (n)

should not be decided in this proceeding in the present state of the record, and that a writ of certiorari should not be granted for that purpose.

Respectfully submitted,

HOVEY C. CLARK,
THOMAS W. WHITE,
Solicitors for Respondent.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of WABASH RAILWAY COMPANY, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY, Respondents.

## BRIEF

**Of Respondent Central Hanover Bank and Trust Company, as Trustee Under First Mortgage of Wabash Railroad Company Dated May 1, 1889.**

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# SUPREME COURT OF THE UNITED STATES.

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## BRIEF

**Of Respondent Central Hanover Bank and Trust Company, as Trustee Under First Mortgage of Wabash Railroad Company Dated May 1, 1889.**

### PRELIMINARY STATEMENT.

We understand that the Court's order granting the petition for certiorari limited the Court's review to the "question of the right of petitioner to intervene in order to assert priority." In preparing our statement of the case and the argument which follows, we have confined both statement and argument to matters which we deem to be relevant to the issue.

## STATEMENT OF THE CASE.

The petitioner, Peter J. Carpenter, originally appealed to the Circuit Court of Appeals for the Eighth Circuit from an order entered by the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri on August 31, 1938, by which the District Court denied petitioner's (appellant's) petition for leave to file an intervening petition in the cause (Rec. p. 84).

The petition was styled "Petition of Peter J. Carpenter for an Order Terminating the Receivership of Wabash Railway Company and dissolving the Temporary Restraining Order and Injunction" (Rec. p. 51). This petition, together with an original application for leave to file the same, were first filed in the District Court of the United States in which the receivership was pending, on January 26, 1938 (Rec. p. 47).

The application and petition were therefore filed long after the first appointment of Receivers in the cause, which was made on December 1, 1931 (Rec. p. 14). The original appointment of Receivers was made on a Bill of Complaint filed by the T. J. Moss Tie Company, a general creditor of the Wabash Railway Company. The Receivers appointed on this creditor's bill, and later their successors, Messrs. Frank C. Nicodemus, Jr., and Norman B. Pitcairn, who were appointed on October 19, 1933 (Rec. p. 33), continued the operation of the properties of the Wabash Railway Company until March 1, 1937. At that time the Chase National Bank of the City of New York, as Trustee under the Refunding and General Mortgage of the Wabash Railway Company, was granted leave to file a Bill of Foreclosure. The foreclosure cause was consolidated with the original equity receivership and Messrs. Nicodemus, Jr.,

and Pitcairn were appointed as Receivers in the Consolidated Cause.

Later, on November 1, 1937, this respondent, the Central Hanover Bank and Trust Company, as Trustee under the First Mortgage of the Wabash Railroad Company, filed a Bill of Complaint, which was thereafter consolidated with the prior causes. The Receivers formerly appointed in the cause were appointed as Receivers in the Consolidated Cause upon the Bill of Complaint of the Central Hanover Bank and Trust Company, and were directed to segregate and sequester the income, rents, tolls and profits from the properties subject to the said First Mortgage for the benefit of the First Mortgage Bondholders (Rec. pp. 43, 44).

The claimant, Peter J. Carpenter, has been represented by experienced counsel at all times and has been familiar with the existence of the receivership proceedings, and has had notice thereof at least since the 1st day of July, 1932. On that day he had filed a claim before Honorable Forrest C. Donnell, Special Master, who had been appointed by the District Court in the receivership cause as a Special Master to hear claims which might be filed in the receivership cause against the Wabash Railway Company (Rec. p. 102).

On August 25, 1935, the claim which the petitioner had filed came on for hearing before the Honorable Forrest C. Donnell, Special Master. Claimant appeared by his counsel, Roberts P. Elam, Esq. Mr. Elam offered in evidence the certified copy of the judgment of the Circuit Court of the City of St. Louis, Missouri (Rec. pp. 103, 104). This was a judgment in the amount of $10,000.00 entered on remand by the Circuit Court of the City of St. Louis, Missouri, after the sum of $5,000.00 had been remitted from the original judgment rendered in favor of claimant on the 13th day of February, 1931. Counsel likewise was

granted leave to offer in evidence at a later date the bill for costs accrued in the trial of the cause of "Peter J. Carpenter vs. Wabash Railway Company." No further evidence was offered.

The Special Master inquired of Mr. Fauser (counsel for the Receivers): "Any objection to either of these offers, Mr. Fauser?" and counsel responded: "No, we agree, further, that the claim be allowed as set out in the judgment." Counsel for the claimant in no way dissented from this statement. Following this statement, together with a statement by counsel for the Reconstruction Finance Corporation, the Special Master announced the following:

> "The Special Master: On this 6th day of January, 1936, there being present Roberts P. Elam, attorney for claimant, the Special Master determined that, pursuant to bill of costs, being attached and marked 'Exhibit B,' hitherto presented to the Special Master by counsel for claimant in the above matter, the court costs hereinbefore referred to are hereby determined to be the sum of $104.15, wherefore, the Special Master determines that he shall report to the Court,
>
> "(a) That said claim, to the extent of $10,000.00 principal, plus $104.15 court costs, plus interest on said principal amount of $10,000.00, at the rate of 6 per cent per annum from February 13, 1931, to December 1, 1931, is correct and valid, and should be allowed in the aggregate of the said principal sum, court costs and interest, as a general unsecured claim, and that judgment should be entered thereon in the above-entitled cause in favor of said claimant, Peter J. Carpenter, and against defendant Wabash Railway Company, in said aggregate amount;
>
> "(b) That said claim is not entitled to any lien or to any priority over other general unsecured claims.
>
> Forrest C. Donnell,
> Special Master."

No objection to or dissent from this statement by the Special Master was voiced by counsel for the petitioner, Peter J. Carpenter, who was present throughout the hearing (Rec. pp. 103-108).

The order appointing Forrest C. Donnell as Special Master provided that "all claims, interpleas, intervening petitions, or other petitions hereafter filed in this cause, by which the claimant, interpleader, intervenor, or other pleader seeks to recover any money or property from the Receivers appointed in this cause out of the estate in their hands, are hereby referred to him for his investigations, determination and report." The order of appointment further provided that "before settling his report in any contested case the Special Master should give the parties in interest reasonable notice of the time when and the place where he will finally settle such report and of the fact that they may desire."

Since the claim of Peter J. Carpenter had been allowed by consent at the hearing on August 26, 1935, and since there had been no dissent by any party, from the Receivers' announcement that the claim might be allowed as a general unsecured claim, the Special Master, evidently concluding that the claim was not a contested claim, filed his report allowing same as a general unsecured claim without further notice. The report was so filed on March 7, 1936 (Rec. p. 105), and no objection to the report as filed was made by the petitioner, Peter J. Carpenter, until the filing of petitioner's present application for leave to intervene in January, 1938, after an interval of nearly two years.

The petition for leave to intervene did not pray for the allowance of petitioner's claim as a preferred claim, nor did it ask that petitioner be allowed to intervene for the purpose of asserting any right of priority on behalf of petitioner's claim. On the contrary, the prayer of the

intervening petition was for four things: (1) The discharge of Messrs. Nicodemus and Pitcairn as Receivers of the Wabash Railway Company; (2) the termination of the receivership of the Wabash Railway Company and the discharge of the property of the Wabash Railway Company from receivership; (3) that the restraining order which had enjoined persons from interfering with the Receivers' possession of the property of the Railway Company be dissolved; and (4) that the Court, if it deem the same proper, grant the Railway Company thirty days within which to institute proceedings under Section 77 of the Bankruptcy Act.

As grounds for the relief prayed for the petition alleged in substance that petitioner, an employee of the Wabash Railway Company, had been injured on February 13, 1931, while working in the course of his employment, and, further set forth the facts with reference to the rendition of a final judgment in petitioner's favor in the amount of $10,000.00 damages for personal injuries so received. The petition asserted that the judgment was a lien upon the real property owned by the Wabash Railway Company and located in the City of St. Louis, Missouri, which was alleged to be of a reasonable value of more than $800,000.00.

The petition then asserted that the firm of Kuhn, Loeb & Company, as the bankers for the Pennsylvania Railroad Company, had obtained control of the Wabash Railway Company, and through such control had elected officers to the presidency and board of directors of the Wabash Railway Company, and had thereby caused the Railway Company to purchase the stock of the Lehigh Valley Railroad Company, and to lose substantial sums of money as the result of such purchases. The petition further alleged that in the year 1927 the Pennsylvania Railroad Company had acquired and still owned 48 per cent of the

voting stock of the Wabash Railway Company, but had acquired such stock control without the permission of the Interstate Commerce Commission, and that through such stock control the Pennsylvania Railroad Company had obtained the appointment of Receivers in the cause. It was further asserted that the insolvency of the Wabash Railway Company was caused by the purchase of Lehigh Valley stock, which was alleged to have been induced by the control of the Pennsylvania Railroad Company. The petition further alleged that although these wrongs were well known to the Receivers of the Wabash Railway Company, for more than six years they had refrained from taking any action to recover damages alleged by petitioner to have been sustained thereby.

Petitioner further alleged that the appointment of Receivers and the entry of the customary order in connection with the appointment restraining the collection of judgments pending the receivership proceedings, were in effect an injunction against petitioner's proceeding to enforce the alleged lien of his judgment; that pending the receivership proceedings the Receivers had derived considerable income from the operation of properties subject to the alleged lien of petitioner's judgment in the City of St. Louis and elsewhere, and that the Receivers had paid out as and for interest on bonds secured by the First Mortgage of the Wabash Railway Company, and other underlying bonds, many millions of dollars from the earnings so derived.

Petitioner further alleged that a portion of the property of the Railway Company was located in the State of Indiana; and that under the decision of the Supreme Court of Indiana in **McCullough et al. v. Union Traction Company of Indiana**, 206 Ind. 585, petitioner was entitled to a preference over the liens of the Mortgages of the Debtor's property as to real estate and improvements of the Rail-

way Company located in the State of Indiana. The petition further alleged that the receivership in the cause had been unduly prolonged and the Court recognized such fact when the Court ordered and directed, on April 19, 1937, that the Receivers file a plan of reorganization in the event that one was not filed by security holders within sixty days thereafter.

Petitioner also alleged the existence and enactment of Section 77 of the Federal Bankruptcy Act. (The allegation referred to the amendment of August 27, 1935—C. 774, 49 Stat. 911, 11 U. S. C. A. 205 (n), which was then in force and effect.)

Petitioner asserted that Section 77 provided a superior and more efficient method of reorganization for insolvent railroad companies, and further alleged that under the terms of said Section 77 a right of preference was created in favor of personal injury claims such as those of petitioner.

Petitioner finally set forth in some detail the number of miles of railway lines operated by the Wabash Railway Company in various states in which its properties were located, and asserted that he brought the action on behalf of himself and others who held claims for personal injuries against the estate of the Wabash Railway Corporation.

In this language we have attempted to state the substance of petitioner's intervening petition. We have not attempted to restate all of the allegations contained in said petition, many of which appear to us to be inconsistent.

The District Court in its order denied leave to file the intervening petition. In its findings of fact and conclusions of law the Court based its denial upon four propositions: (a) The petition did not conform to the requirements of Equity Rule No. 37; (b) the status and classi-

fication of the appellant's claim as a general unsecured claim had been correctly and finally determined by the Special Master and the petitioner was estopped from asserting any preference and priority; (c) the intervening petition failed to state a cause of action in equity, and the granting of leave to file would merely encumber and delay the orderly processes of reorganization; and (d) the dismissal of the injunctive proceedings on the order of the Court would be of no benefit to the claimant because in any event the properties of the Railway Company would remain in the exclusive custody and control of the Court's Receivers.

The Circuit Court of Appeals affirmed the District Court's order and its opinion is reported in full in 103 Fed. (2d) 996, and appears in the Record at pages 125 to 135.

## APPELLANT'S SPECIFICATIONS OF ERROR.

We desire under this heading to point out that the specifications of error, A, B, C, D and E (Petitioner's Brief, pp. 9 and 10), go entirely outside the limited scope of the review fixed in the cause by this Court's order which in granting petitioner's application for writ of certiorari and limited it to the "question of the right of petitioner to intervene in order to assert priority." We assume that neither citation of authority nor argument is necessary to support the proposition that the scope of review in this case is determined by the Court's order rather than the petitioner's attempted expansion thereof in his specifications of error.

## ARGUMENT.

### I.

**No absolute right of intervention existed. Intervention was neither necessary nor indispensable to the enforcement of any substantive right of petitioner. The allowance of the intervention was therefore a question for the exercise of the sound discretion of the trial court and is not subject to review on appeal.**

In our brief in opposition to the issuance of a writ of certiorari in this cause we pointed out (Resp. Brief pp. 4 to 7) that the fundamental question for decision on appeal by the Circuit Court of Appeals in its opinion rendered below was the question of whether the petitioner had an absolute right to intervene, or whether (as respondents contended below and the Circuit Court of Appeals for the Eighth Circuit held) the allowance or denial of the petition for leave to intervene was a matter addressed solely to the sound judicial discretion of the trial court and therefore not subject to review on appeal.

In order to determine whether an absolute right of intervention existed or whether the allowance of the intervention was merely discretionary, it was necessary for the Circuit Court of Appeals to examine the proceedings below with a view to determining whether an intervention as a party to the cause was necessary and indispensable to the protection of any substantive right of the petitioner.

The decision of this Court in **Credits Commutation Company v. United States**, 177 U. S. 311, 44 L. Ed. 783, is a leading case upon the subject and lays down the principles of law with reference to the allowance of interventions, which have been consistently followed by the federal courts since that time.

In that case a petition for leave to intervene as a party to a receivership action was denied. An appeal was perfected to the Circuit Court of Appeals, which dismissed the appeal on the ground that the denial of the intervention was not an appealable order. The Court stated the rule applicable as follows (l. c. 785):

> "When such action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. * * * It is doubtless true that cases may arise where the denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervener's claim by denying him all right to relief. The cases at bar, however, are not of that character."

These general principles have been followed by the federal courts consistently since that date and applied in the following cases, among others:

> Radford Iron Co., Inc., v. Appalachian Electric Power Co., 62 Fed. (2d) 940, Cert. Den. 289 U. S. 748, 77 L. Ed. 1494;

Gaines v. Clark, 275 Fed. 1017;
Elkins v. First National Bank, 43 Fed. (2d) 777, C. C. A. 4th;
Merriam v. Bryant, 36 Fed. (2d) 578, C. C. A. 9th;
Central Trust Co. v. Chicago, R. I. & P. Ry. Co., 218 Fed. 336, C. C. A. 2nd;
United States Trust Co. v. Chicago Terminal Ry. Co., 188 Fed. 292, C. C. A. 7th.

In order to determine whether the denial of an intervention would be a "practical denial of certain relief to which the intervener is entitled and which he can only obtain by intervention," it was necessary for the Circuit Court of Appeals to consider the nature of the receivership proceeding and the nature of the claims which petitioner sought to assert by intervention, and in the course of its consideration of these matters the Circuit Court of Appeals ruled upon the various subsidiary questions of law which are outlined in its opinion.

The record in the case shows quite plainly that an intervention was not indispensably necessary for the protection of petitioner's rights, for the simple reason that the orders entered by the District Court in the receivership proceedings which provided for the appointment of a Special Master and the hearing of claims by the Special Master furnished a full, adequate and complete remedy for the enforcement of petitioner's substantive rights without the necessity of any formal intervention as a party to the cause.

The trial court in its order appointing the Special Master (Rec. pp. 22, 23) authorized the Special Master to investigate, determine and report upon any and all claims against the receivership estate. No reason why petitioner could not have asserted any claim or preference to which he may have been entitled in and as a part of his claim filed before the Special Master has been suggested, either

in petitioner's brief filed in this court or the briefs filed below.

It is true that the petitioner's claim was a claim against the assets of the receivership estate which was being administered by the District Court. There is, however, no basis whatsoever for concluding that the substantive rights of the intervenor against the receivership estate could only be protected by a formal intervention as a party to the cause. The order appointing the Special Master was quite broad and all-inclusive in its terms. It authorized the Special Master to hear every type of claim, in the following manner:

> "All claims, interpleas, intervening petitions, or other petitions hereafter filed in this cause by which the claimant, interpleader, intervenor or other pleader seeks to recover any money or property from the receivers appointed in this cause out of the estate in their hands, are hereby referred to him for his investigation, determination and report" (Rec. p. 23).

After providing generally for the method of procedure before the Special Master the order gives a right of review in broad terms to any party who may be aggrieved by his decision by providing as follows (Rec. p. 23):

> "Before settling his report in any contested case, the Special Master shall give the parties in interest reasonable notice of the time when and the place where he will finally settle such report and of the fact that they may desire. Any party to such a cause, who feels aggrieved at the finding or decision of the Special Master may, at the time fixed by the Special Master for settling his report, file any such exceptions in writing to the same as may be deemed appropriate by such party, and no exceptions not so filed, will be considered by the Court. The Master will notify all parties interested in the matters presented by petitioners in such cases of such fact."

Under the terms of this order the petitioner had a simple, but full and adequate, remedy for the assertion of whatever claims of preference, if any, he was entitled to assert. There was no reason for allowing petitioner to encumber an already complicated proceeding by an intervention as a party to the cause when his substantive rights could have been sufficiently protected in a much simpler and more direct manner.

We need hardly call attention to the well-known fact that there are ordinarily a vast number of claims based both on contract and upon negligence for personal injuries outstanding against almost any large railroad system at the time of the appointment of receivers. When a large property in which there are many conflicting interests is administered and finally reorganized, the allowance of interventions which are really necessary will ordinarily result in a somewhat complex proceeding. If to the number of necessary interventions there is to be added the formal intervention of other parties whose rights may be sufficiently protected by the mere filing of a claim before the Special Master, the proceedings will become hopelessly encumbered and complicated and ultimate reorganization and discharge from receivership postponed even further.

It was for the purpose of allowing personal injury claimants a simpler remedy for the prosecution of their claims against the estate in receivership that the order appointing the Special Master was made. The practice is one that is common to nearly all receiverships or reorganizations and has grown up because it is a simple and efficient method for the adjudication of a vast number of claims. The claimant here had a full, adequate and complete remedy, and was properly denied the right to intervene because intervention was neither necessary nor indispensable to the protection of his rights.

The fact is that the petitioner had availed himself of

the procedure afforded by the District Court for the determination of the validity and priority of claims by filing his claim before the Special Master "on or prior to July 1, 1932 (Rec. p. 102). Claimant was then granted all the relief prayed for. His claim was allowed as a general unsecured claim in the face amount of the judgment, together with interest and court costs, in the presence of counsel for the petitioner (claimant), without any objection on the part of his counsel.

The Circuit Court of Appeals properly held that the petitioner, having once stipulated for the allowance of his claim as a general claim against the receivership estate, should not be entitled after the lapse of several years to change his position and come forward with belated assertions of a claim to a right of preference in payment. Assuming, however, for the sake of argument that petitioner is not barred from asserting a right of preference, it still does not follow that his intervening petition should have been granted, because in any event, any legal argument in support of a right of preference which petitioner desired to assert could have been set forth in an amended claim filed by leave of court, and the claimant still had an adequate and complete remedy available for the presentation of these issues at a hearing before the Special Master.

In any case, therefore, the denial of claimant's application for leave to intervene did not deprive claimant of any substantive right. He had an adequate and complete remedy open to him at all times. He refused to take advantage of it, but chose, instead, to attempt to encumber the proceedings by an unnecessary intervention as a party to the cause. The trial court's denial of his application was therefore a reasonable and proper exercise of judicial discretion, within the rule laid down by this Court in the **Credits Commutation Case**, and therefore was not subject to review in the Circuit Court of Appeals on appeal. The

Circuit Court of Appeals quite properly affirmed the order of the District Court.

II.

**Under the record facts the trial court's denial of leave to file petitioner's intervening petition was a proper exercise of judicial discretion which was not subject to reversal on appeal.**

Petitioner's intervening petition was not, we respectfully submit, a petition for leave to intervene in order to "assert a claim of preference" in the receivership proceedings. The terms of the petition summarized in our Statement of Facts, and set forth in full in the Record (Rec. pp. 51 to 77), indicate quite clearly that what petitioner sought was not to assert a right of preference in the receivership proceedings, but rather to secure the dismissal of the receivership proceedings and the discharge of the Receivers, so that petitioner might then proceed to enforce the alleged judgment lien which petitioner claimed, or so that the Railway Company might be forced into reorganization proceedings, in which event petitioner anticipated that he would have a right of preference under the terms of the Railroad Reorganization Act as it then stood.

It is true that petitioner did allege in paragraph 15 of his petition (Rec. p. 4) that he was entitled to a lien against the Missouri property of the Railway Company under the terms of his judgment, and did in paragraphs 17 and 18 thereof (Rec. p. 66) assert that under the law of the State of Indiana personal injury judgments were entitled to preference, and that his claim should be considered an operating expense, because such claims were classified as operating expense for accounting purposes under the regulations of the Interstate Commerce Com-

mission. However, these facts are not stated as a basis for the allowance of a preferred claim to the petition in this receivership proceeding. On the contrary, these facts are stated as a ground for petitioner's prayer that the Receivers be discharged and that the Railway Company be given thirty days within which to avail itself of the provisions of Section 77 of the Bankruptcy Act.

**The petitioner's (Carpenter's) petition was therefore not a petition for leave to intervene in order to assert a right of preference, and in point of fact, as demonstrated under Point I, no intervention was necessary in order to assert or claim a right of preference. Petitioner sought leave to intervene in order to secure an order terminating the receivership and discharging the Receivers.**

Assuming, however, contrary to the prayer for relief contained in the petition, that the intervention was sought in order to assert a right of preference, this certainly was not a sufficient ground for the allowance of an intervention, when the claim of preference could have been asserted equally well without so encumbering the proceedings. See **Elkins v. First National Bank of the City of New York**, 43 Fed. (2d) 777, where the Circuit Court of Appeals for the Fourth Circuit stated (l. c. 779):

> "There can be no question, we think, that the petition for intervention was properly denied. As originally presented, it amounted to no more than an application on the part of the petitioners to have themselves made parties to the receivership proceeding in order that they might determine a question as to priority in the allowance and payment of claims. A special master had been appointed to pass upon just such questions, and any claim of petitioners to priority or any objection to the claim of the bank should have been made before him. It is not the ordinary or the proper procedure in a receivership proceeding to allow claimants who can have their contro-

versies settled before a master with right of review by the court, to be made parties to the original cause and thus complicate the issues there involved. Acme White Lead and Color Works v. Republic Motor Truck Co. (D. C.), 285 F. 88; Jones & Laughlin v. Sands (C. C. A. 2d), 79 F. 913; Sands v. Greeley Co. (C. C.), 80 F. 195."

The balance of the petition consisted of allegations designed to show that the Wabash Railway Company, prior to receivership, had been caused to sustain various losses because of the alleged domination and control of the Pennsylvania Railroad Company, and further to show that the Receivers appointed in the cause were unfit persons to control the properties because of their alleged previous connection with the Pennsylvania Railroad Company. These allegations obviously had nothing to do with the existence or nonexistence of any right of preference on the part of the petitioner and were relevant only to petitioner's prayer for the discharge of the Receivers and the termination of the receivership proceedings.

The District Court in its conclusions of law found (Rec. p. 83) that "The granting of leave to file will merely serve to encumber and delay the orderly processes of these cases toward a reorganization of the properties of the defendant railway company." The Circuit Court of Appeals affirmed this finding of the District Court in the following language:

"The Consolidated Cause in which the receivers have been appointed includes bills for foreclosure and impounding of income, rents, issues and profits under the provisions of prior and primary mortgages. There are no allegations and no claim that such mortgages are invalid, nor that their holders or trustees are parties to the practices charged to be fraudulent and illegal in the petition sought to be filed by appellant. It is apparent, as found by the trial court, that the

dismissal of the injunctive orders and of those appointing the receivers would be of no aid to said petitioners without the dismissal of the several causes, and that to protect the prior lien holders in the rights and powers held and exercised by them, the properties of the defendant Railway Company must remain in the exclusive custody and control of the court's receivers. As indicated by conclusions of the trial court a reorganization is in process, and to the propriety of its terms when submitted objections may be entertained.

"In cases involving the complexity of this Consolidated Cause large discretion is lodged in the district court. In exercising its discretion the court should consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Rules of Civil Procedure, 24 (b), 28 U. S. C. A., following section 723c. In denying the application to intervene we cannot say that discretion has been abused. Appellant has disclosed no legal interest as a claimant that has not already been recognized, and may not be realized in the orderly process without the drastic disorganization contemplated and prayed in the petition sought to be filed.

"The decree below accordingly is affirmed."

The record facts amply sustain the findings of the District Court and the opinion of the Circuit Court of Appeals in this regard. It appears (Rec. p. 38) that The Chase National Bank of the City of New York on March 1, 1937, filed its Bill of Foreclosure as Trustee under the Wabash Railroad Company Refunding and General Mortgage, and it further appears (Rec. pp. 43, 44) that a Bill of Complaint was filed on November 1, 1937, by the Central Hanover Bank and Trust Company, as Trustee under the First Mortgage, and that pursuant to this Bill of Complaint the income from the property subject to the First Mortgage was segregated and sequestered for the benefit of the

First Mortgage Bondholders. Such actions are, as a matter of common knowledge, steps taken in the orderly reorganization of a railroad company. Although they amount to only a fragment of the record which was before the District Court when it entered its order, they indicate quite plainly the foundation for the District Court's conclusion that the appellant's petition should be denied, because it would result in an unnecessary interference with the orderly processes of reorganization of the Wabash Railway Company without any substantial benefit to appellant or anyone else.

In the exercise of its sound judicial discretion, the trial court was also entitled to take into consideration the fact that claimant, although represented by counsel at all times, and although he had notice of the proceedings at least as early as July 1, 1932, when his claim was filed (Rec. p. 102), made no effort to call to the attention of the trial court the matters set forth in his intervening petition for a period of about five and one-half years, or until January 26, 1938. Appellant appeared by counsel before the Special Master at the hearing on his claim on August 26, 1935, and made no claim of any right of preference. On the contrary, appellant through his counsel was present and voiced no objection when the Special Master announced that his claim would be allowed as a general unsecured claim for the full amount of the judgment, together with interest and costs. Finally, the appellant stood silently by for over a year after the report of the Special Master was filed, recommending that no priority be allowed to his claim.

During this period the Bill of Foreclosure was filed on behalf of the Chase National Bank of the City of New York, as Trustee under the Refunding and General Mortgage, Receivers were appointed and ancillary proceedings were taken in the other jurisdictions in which the railway

company's properties were located, and then later the Bill of Complaint of the Central Hanover Bank and Trust Company, as Trustee under the First Mortgage, was filed and Receivers were appointed thereunder.

The granting of Carpenter's intervening petition, which was directed primarily at the discharge of the Receivers and the termination of the receivership, would have upset and rendered entirely useless every one of the steps which had been taken toward the reorganization of the Railway Company by the parties to the cause. The trial court was familiar with the detailed steps which had been taken in the proceedings and with knowledge of all these facts, and of the delay on the petitioner's part, denied him an intervention. Under such circumstances it should be clear that the laches of the petitioner were sufficient to cause a court of equity to deny him the relief prayed for irrespective of any other issue in the case.

III.

**Neither the applicability nor the constitutional validity of the amendment to Subsection (n) of Section 77 of the Bankruptcy Act of August 11, 1939, can or should be determined by this Court on the present record. These questions should be determined when raised by a proper proceeding in which the relevant facts are before the Court.**

Petitioner's brief calls attention to the enactment of the amendment to Subsection (n) of the Railroad Reorganization Act on August 11, 1939. The text of the amendatory act of Congress is correctly set forth in the appendix to petitioner's brief at page 29.

The case was considered by the Circuit Court of Appeals and its opinion rendered on May 13, 1939, prior to the enactment of the amendment. The intervening peti-

tion was originally filed in the District Court in January, 1938, and submitted to the District Court for decision on April 4, 1938, and the Court entered its order denying leave to file on August 31, 1938 (Rec. pp. 76, 77, 78).

Obviously, none of the parties to the cause anticipated the enactment of the amended section by Congress at the time the record was made and the cause was submitted to the District Court for decision.

The petitioner calls attention to decisions such as **United States v. Schooner Peggy, 1 Cranch. 103, 109; Dinsmore v. Southern Express Company et al.**, 183 U. S. 115, 120, and others, in support of the contention that the Court on appeal should take into consideration the provisions of this amendment and hold that petitioner is entitled to a right of preference thereunder, irrespective of the soundness of petitioner's contentions with regard to the existence of a right of preference prior to the amendment.

**While it is doubtless true that the Court on appeal cannot exclude the amended section from its consideration because the amendment was enacted after the cause was tried and heard in the courts below, and while under the rule announced in these decisions petitioner is not deprived of whatever rights, if any, he may have under the terms of the amendment by reason of the fact that it was enacted after the trial below, none of these considerations justify the conclusion argued for by the petitioner.**

Granting to the fullest extent that the fact that the amendment was enacted subsequent to the decision on petitioner's claim below does not deprive him of any rights to which he may be entitled under its terms, there still remains for decision the question of whether the amendment is or was intended by Congress to be applicable in terms to claims such as those of the petitioner, and the further question of whether, if applicable to the

petitioner's claims, the amendment does not conflict with the due process clause of the Fifth Amendment to the Constitution of the United States as applied to the particular facts in this case.

**As a corollary to the proposition that petitioner loses no rights under the terms of the amendment because of its enactment after the decision below and during the pendency of the cause on appeal, it should follow that the respondents' rights to brief and argue the applicability and constitutionality of the amendment upon a record prepared for the purpose of properly presenting those issues should not be eliminated by the disposition of the cause on appeal.**

The facts relevant to the determination of these questions are not shown by the present record. The record fails to show the date of issuance or the fact of recording or the specific property covered by the lien of any one of the Mortgages of the Railway Company's property. The record does not show the total amount of principal and interest due on the issues of bonds outstanding under the terms of the various Mortgages. (The only statement with regard to this matter is a statement of the principal amount of the bonds appearing in the Record at pages 6 and 7.)

The record does not show the date of default or the fact of the entry of the order sequestering and impounding income for the benefit of the holders of the First Mortgage Bonds, or the values of the mortgaged properties.

The record shows the fact that the claimant's claim was filed in 1932, and that it was allowed as a general unsecured claim in 1935. It indicates that proceedings looking toward a reorganization had been taken, but fails to show in any comprehensive detail at all the full extent of the proceedings taken toward reorganization in this case, or

the treatment to be afforded to claims such as petitioner's claim in the plans for reorganization.

The question of whether the amendment is by its terms applicable to a receivership which has been pending for a number of years prior to its enactment and to a claim the status of which had been determined prior to its enactment, should only be determined upon a record in which the facts relevant to these questions have been fully presented to the Court for consideration.

Further, the allegations and prayer for relief of the intervenor's petition are wholly inconsistent with any claim to a preference in the receivership proceedings under the terms of the amendment to subsection (n).

What the petition sought is the dismissal of the receivership proceedings so that the petitioner may proceed to enforce his alleged judgment rights by action, or may when a subsequent bankruptcy proceeding is instituted under Section 77 of the Bankruptcy Act avail himself of the preference created by the former section in bankruptcy proceedings alone. The amended section if applicable at all renders entirely futile and useless the relief prayed for in petitioner's intervening petition. If the amended section is valid, and if it is applicable to petitioner's claim, petitioner certainly has neither need for nor any occasion to urge the dismissal of the receivership proceedings, because his rights, if any, under the amended section can be fully asserted in the receivership proceedings.

The application of the amended section to petitioner's intervening petition or to the record established in this cause would be wholly incongruous. The issues which petitioner raised by his intervening petition were correctly decided against him by the Circuit Court of Appeals. When and if petitioner's rights under the amended section are before the Court for consideration in a proper

proceeding to which such questions are reasonably relevant, the nature, scope and validity of the amendment can be determined. Respondent, therefore, respectfully submits that the orders of the District Court and the Circuit Court of Appeals should be affirmed, and that the questions raised by the amendment to Subsection (n) should be reserved for decision until such time as they are properly before the Court.

Respectfully submitted,

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Of Counsel.

No. 230

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939

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PETER J. CARPENTER,

*Petitioner,*

*v.*

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., and NORMAN B. PITCAIRN, Receivers of Wabash Railway Company, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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## BRIEF FOR RESPONDENT THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK AS TRUSTEE.

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November 27, 1939.

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*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF FOR RESPONDENT THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK AS TRUSTEE.

Peter J. Carpenter, the petitioner herein, seeks to intervene in the pending equity receivership of the Wabash Railway Company to assert priority of a judgment claim for personal injuries to the petitioner as an employee of the Railway Company.

This respondent The Chase National Bank of the City of New York is the Trustee under the Wabash Railway

Company Refunding and General Mortgage dated January 1, 1925, one of the mortgages in respect of which the petitioner is seeking to assert priority.

## Opinions Below.

The opinion of the District Court of the United States for the Eastern Division of the Eastern District of Missouri is not reported (R. 78-83).

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 113-123) is reported in 103 F. 2d 996.

The petition of Carpenter, the petitioner herein, for a rehearing was denied without written opinion (R. 137).

## Jurisdiction.

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

## Question Presented.

The question in this case is limited by the order granting the petition for certiorari to the question of the right of the petitioner to intervene in order to assert priority.

## Statute.

Section 77(n) of the Bankruptcy Act, as amended August 11, 1939, is set forth in the Appendix, *infra*, p. 9.

## Argument.

This respondent believes that the decision of the District Court, in the light of the provisions of Section 77(n) of the Bankruptcy Act then in effect, was clearly correct,

and that the arguments in the petitioner's brief before this Court seeking to show said decision to have been erroneous have been completely discussed and answered in the opinion of the District Court and in the opinion of the Circuit Court of Appeals for the Eighth Circuit affirming said decision; accordingly, this respondent will refrain from discussing these arguments.

By the amendment of August 11, 1939, the provisions of Section 77(n) were in effect extended to apply to "equity receiverships of railroad corporations now or hereafter pending in any court of the United States * * *."

This respondent concedes that, in determining what justice now requires in this proceeding, this Court may consider the change in the statute which has supervened since the decision of the District Court. A consideration of the amendment, however, does not lead to the conclusion, it is submitted, that the decision of the District Court should be reversed.

This respondent believes that, even in the light of the provisions of Section 77(n) now in effect, this Court may not decide, as part of the question before the Court in this case, whether the claim of the petitioner, under the amendment, is preferred.

The time for filing claims in the Wabash Railway Company equity receivership expired more than seven years prior to the amendment of August 11, 1939 (R. 24). The question of extending the time for filing claims rests in the discretion of the receivership court, to be exercised in the light of all the relevant facts involved in the receivership; the question has not been presented to the receivership court nor passed upon by it; since only the receivership court is in possession of all the relevant facts, this respondent believes that the Supreme Court, as an appellate court

in this certiorari proceeding, is not the appropriate tribunal to pass upon the question, but that the appropriate tribunal for the purpose is the receivership court.

The question before this Court is whether the decision of the District Court should be reversed. A reversal would in effect be an adjudication extending the time for filing a claim based upon the amendment of August 11, 1939. Such an adjudication by this Court, as an appellate court in this certiorari proceeding, would amount to an exercise of discretion by a tribunal lacking the essential information without which the discretion cannot be justly or wisely exercised.

The statute provides that "claims for personal injuries to employees of a railroad corporation * * * shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad."

The statute does not provide that the time for filing such claims shall be extended.

Suppose that on August 12, 1939, a railroad receivership had been almost terminated; suppose the sale of the assets to a new corporation had been made; suppose the reorganization plan had been agreed upon by the parties in interest and approved by the court; and suppose the court was about to confirm the sale and the new securities were about to be issued under the plan. The statute of August 11, 1939, contains no language, it is submitted, requiring that the time for filing priority claims for personal injuries to employees of the railroad be extended and that the receivership be continued and the sale stayed and the reorganization deferred until the filing and adjudication of such claims. No reason suggests itself for believing that any such obstructive and chaotic effect was intended by the statute.

Concededly the statute does not provide that claims barred by the statute of limitations shall nevertheless be preferred and paid. The statute deals with the priority to be accorded to certain claims, and does not deal with the question whether such claims may or may not in particular instances be barred by the statute of limitations or by other applicable limitations on the time for filing claims.

The orderly process of administration of a receivership estate requires a reasonable determination of the time and manner of filing and adjudicating claims.

By the order dated April 7, 1932, the time for filing claims was limited to July 1, 1932 (R. 23-25).

The first question is whether the time for filing priority claims for personal injuries based on the statute as amended may now be extended. Until this question is answered, the question of the priority of the petitioner's claim under the statute is not in issue. If the question as to extending the time is ultimately decided in the negative, there will be no occasion at all for passing on the particular priority question.

Only the District Court is in a position to determine the question as to extending the time.

Particularly in the case of a complex equity railroad receivership like that of the Wabash Railway Company, the determination can reasonably be made only in the light of the status of the receivership proceeding and the prospects of reorganization and the rights of the other parties in interest; only the receivership court possesses the essential information as to these considerations.

That the receivership court alone is adequately informed with respect to the complicated considerations involved in the question whether the time for filing claims should be extended, is illustrated by the rule that the dis-

cretion of the receivership court in the determination of that question is a broad discretion reviewable only for abuse: *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 229 Fed. 120 (C. C. A., 2nd Circ., 1915); *McDonald* v. *Aetna Indemnity Co.*, 91 Conn. 359 (1917); *Spooner* v. *Blair*, 209 Iowa 1113 (1930); *Matchan* v. *Phoenix Land Inv. Co.*, 159 Minn. 132 (1924); and Fletcher, Cyclopedia Corporations (Perm. Ed.), Section 7900.

Accordingly, this respondent submits that, unless and until the District Court upon proper application has passed upon the question as to extending the time for filing the petitioner's claim under the statute, the question of the priority of the claim is not properly before this Court.

The petition in this case did not ask the District Court to extend the time to file priority claims based upon the amendment of August 11, 1939.

It may well be that the enactment of the amendment of August 11, 1939, constitutes a reason why the petitioner may properly ask the District Court to pass upon the question of the propriety of such an extension of time, but the petitioner has not asked the District Court to do so.

This certiorari proceeding does not have the effect of bringing this question before the District Court; the reasons are set forth above why the District Court, and not the Supreme Court as an appellate tribunal, is believed to be the appropriate court to pass upon the question. Accordingly, the record in this certiorari proceeding shows no reversible error.

## Conclusion.

Wherefore, this respondent respectfully submits that the decision of the District Court of the United States for

he Eastern Division of the Eastern District of Missouri hould be affirmed.

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*Of Counsel.*

November 27, 1939.

## Appendix.

The Act of Congress approved August 11, 1939:

"[Public—No. 386—76th Congress]
[Chapter 689—1st Session]
[S. 2654]

AN ACT

"To amend subsection (n), section 77, of the Bankruptcy Act, as amended, concerning payment of preferred claims.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the first sentence of section 77, subsection (n), of the Bankruptcy Act, as amended, be further amended to read as follows:

"'(n) In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustees appointed pursuant to this section, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad.'

"Approved, August 11, 1939."

Section 77 (n) of the Bankruptcy Act [11 USCA Section 205 (n)], prior to the amendment of August 11, 1939:

"In proceedings under this section, claims for personal injuries to employees of a railroad corporation,

claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims on August 27, 1935 or thereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds executed by sureties without security for and in any action brought against such railroad corporation or trustee appointed pursuant to this section, shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad. No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in sections 151 to 163 of Title 45, as amended June 21, 1934, or as they may be hereafter amended. No reorganization effected under this title and no order of the court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title."

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., and NORMAN B. PITCAIRN, Receivers of Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, THE CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY, Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

## BRIEF

**Of Wabash Railway Company and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company.**

HOMER HALL,
NAT S. BROWN,
Counsel for Respondents Wabash Railway Company and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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# SUPREME COURT OF THE UNITED STATES.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

## BRIEF

**Of Wabash Railway Company and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company.**

### PRELIMINARY STATEMENT.

The respondents, Wabash Railway Company and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, state to the Court that they adopt as their statement of the case the statement set out in the briefs of the respondents, Central Hanover Bank & Trust Company, as trustee, and Chase National Bank of the City of New York, trustee, etc., heretofore filed in this case.

## ANSWER TO PETITIONER'S SPECIFICATIONS OF ERROR.

On pages 9 and 10 of petitioner's brief he has set out his specifications of error A, B, C, D and E. Specifications A to D, inclusive, go to the merits of the decision of the Circuit Court of Appeals and are not within the scope of this review, since the order entered by this Court on October 9, 1939, granting the petition for a writ of certiorari, was

> "limited to the question of the right of the petitioner to intervene in order to assert priority."

We do not believe it was the intent or the purport of this Court's order to at this time go into all the questions dealing with the merits of the case presented by petitioner's specifications of error A to D. This Court saw fit to limit the scope to a specific question, and the attempt of the petitioner to bring before this Court extraneous matters does not, in our opinion, make argument on these points necessary.

Specification of error E, which is the only one of the specifications pertinent at this time, states:

> "The Circuit Court of Appeals for the Eighth Circuit erred in deciding and adjudging that the District Court had, and properly exercised, a discretion to deny petitioner leave to file the petition which, on January 26, 1938, he presented and applied to said District Court for leave to file in said receivership proceeding."

Our argument will be limited to this specification.

## ARGUMENT.

### I.

### The Record in This Case Shows That the Trial Court Properly Denied Petitioner Leave to File His Intervening Petition.

It is our understanding that no absolute right of intervention exists unless such intervention is necessary and indispensable to the enforcement of substantial legal rights of the intervener. If no substantial legal rights are prejudiced by a denial of intervention, the ruling is within the discretion of the trial court and not appealable. The burden is upon the petitioner to make it clearly appear that his rights will be lost to him by the refusal of a right to intervene. The cases where it is held that a right to intervene is absolute and a denial of the intervention by the trial court would be appealable are limited to those where the intervention is indispensable to the preservation or enforcement of the claim of the petitioner and where he is not already being fairly represented in the litigation. In the present case, before it could be held that the petitioner's petition should be granted as a matter of right, it is necessary that he show that he has a substantive right which would be lost if he were not allowed to intervene and that he was not at that time being fairly represented by those who were parties to the suit.

It is necessary, in order to see if the petitioner has sustained this burden, to examine the proceedings in the District Court to determine whether at the time petitioner's petition for leave to file his intervening petition was filed it was necessary and indispensable that he be made a party to protect his rights. In other words, was the denial by the trial judge of petitioner's petition to

intervene such as to be a denial of certain relief to which he was entitled and which could only be obtained by allowing him to intervene?

The District Court, which had appointed the Receivers who are respondents here, was of course familiar with the parties, the various claimants, the numerous equities involved, and the status of the case at the time petitioner filed his petition for leave. The District Court, in its conclusions of law (Record p. 83), said of this petition:

> "The granting of leave to intervene will merely serve to encumber and delay the orderly process of these cases toward a reorganization of the properties of the defendant railroad company."

The Circuit Court of Appeals, in affirming this finding of the District Court, stated:

> "In denying the application to intervene we cannot say that discretion has been abused. Appellant has disclosed no legal interest as a claimant that has not already been recognized, and may not be realized in the orderly process without the drastic disorganization contemplated and prayed in the petition sought to be filed."

The courts below point out that the petitioner had in no way brought himself within that class of persons to whom intervention must be granted as a matter of right. At the time his petition to intervene was filed the reorganization of the Wabash Railway Company was progressing in an orderly manner. The rights of all claimants, including this petitioner, had been safeguarded. The order appointing the Special Master had protected the rights of claimants of every type. There is no evidence in this record that any fraud, discrimination or unfair procedure had been practiced against this petitioner nor that his full rights were not protected at all times. Further, there is a complete failure of proof of any loss that he has suf-

fered or will suffer by reason of the refusal of the trial court to allow him to intervene.

The decision of this Court in the case of City of New York v. New York Telephone Co., 261 U. S. 312, 316, states the law as it was applied to a state of facts very similar to those in the present case:

> "There is nothing in this case to show that the Public Commission will not fully and properly represent the subscribers resident in New York City. Indeed it was said at the bar that the City and the Public Commission and the Attorney General were co-operating in every way in the defense of the suit. It was completely within the discretion of the District Court to refuse to allow the City to become a defendant when its interests and those of its residents were fully represented under the law and protected by those who had been made defendants. There is nothing to show that the refusal complained of was an abuse of discretion. This same controversy arose in the case of the City of New York v. Consolidated Gas Co., 253 U. S. 219, and the same conclusion was reached. Indeed it was there said that an order like the one here objected to was not of such a final character as to furnish the basis of an appeal, citing Ex parte Cutting, 94 U. S. 14, 22; Credits Commutation Co. v. United States, 177 U. S. 311, 315; Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578, 581. These cases show that exceptional circumstances may make an order denying intervention in a suit a final and appealable order, but the present is not one of them."

## II.

**Any Question Concerning the Applicability or Validity of Amended Subsection (n) of Section 77 of the Bankruptcy Act Cannot Properly Be Determined by This Court on the Present Record.**

The petitioner seems to feel that what is before the Court at the present time is not to be limited to the specific question set out in this Court's order granting the petition for a writ of certiorari, namely, the error of the Circuit Court of Appeals in sustaining the District Court's refusal to allow the petitioner to intervene to assert priority, but includes also the effect the amendment of Subsection (n) of the Railroad Reorganization Act on August 11, 1939, will have on this proceeding. The petitioner's position apparently is that the District Court should have allowed him to intervene on January 26, 1938, at which time his original application for leave to intervene was filed in the District Court, because on August 11, 1939, an amendment to the Bankruptcy Act, which he claims has affected his rights, was passed. Obviously, the District Judge, when he denied the intervention, and the Circuit Court of Appeals, when it affirmed the action of the District Judge on May 13, 1939, did not and could not consider the effect, if any, this amendment would have on the claim of petitioner. Of course, this question is not before this Court at the present time.

The sole question now to be determined is whether or not the trial judge, acting only upon the facts which were before him at the time he made the order, erred in denying the petitioner the petition to intervene. The amendment to the Bankruptcy Act may or may not affect the present rights of the petitioner, and it seems apparent that if this act had been in effect on January 26, 1938, the petitioner

would not have considered it necessary to seek leave to file his elaborate petition to set aside and dismiss the receivership proceedings, because if he had any rights based on the amendment to the Bankruptcy Act they could, and doubtless would, have been completely asserted in the general receivership proceedings. The record sustains the correctness of the Circuit Court of Appeals and the District Court in ruling against the petitioner on this point.

Respondents therefore respectfully submit to this Court that the petitioner has not sustained the burden of showing that at the time his petition to intervene was denied he suffered a prejudice to any substantial legal right, and that the orders of the District Court and the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

HOMER HALL,
NAT S. BROWN,
Counsel for Respondents Wabash Railway Company and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

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| PETER J. CARPENTER, Petitioner, vs. WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of WABASH RAILWAY COMPANY, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY, Respondents. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. |

## PETITION

Of Respondents, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, for a Modification of the Judgment Entered Herein, or, as an Alternative, for a Rehearing.

FRANK C. NICODEMUS, JR.,
HOMER HALL,
NAT S. BROWN,
Counsel for Respondents, Receivers of Wabash Railway Company.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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The petition should be granted:

I. Because the judgment of this Court, if permitted to become effective, will seriously impair vested rights of many other judgment creditors of the insolvent Wabash Ry. Co., without the facts relating to their situation in the Wabash Receivership proceeding being before the Court and without any opportunity on their part to be heard upon the issues ..... 2

II. The judgment of this Court directing the District Court to allow petitioner's claim cannot end this litigation for the reason that it does not dispose of the question whether petitioner is entitled to be paid interest, and if so from what date..... 8

III. Because the application of Amended Section 77 (n) of the Bankruptcy Act retrospectively to equity receiverships of railroad corporations now pending in the courts of the United States is violative of the rights of other lien creditors of the insolvent Railway Co. under the Tenth Amendment to the Constitution..... 9


### Cases Cited.


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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

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| PETER J. CARPENTER, Petitioner, vs. WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of WABASH RAILWAY COMPANY, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY, Respondents. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. |

## PETITION

**Of Respondents, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, for a Modification of the Judgment Entered Herein, or, as an Alternative, for a Rehearing.**

Now come respondents Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, and respectfully petition this Honorable Court to modify the judgment entered herein, in the respects hereinafter set forth, or, as an alternative, to grant a rehearing of this cause, for the following reasons, to wit:

I.

Because the judgment entered herein on January 29, 1940, if permitted to become effective, will seriously impair vested property rights of many other judgment creditors in and to the assets of the insolvent, Wabash Railway Company, without the facts relating to their situation in the receivership proceedings being before this Court, and without any opportunity to be heard upon the issues of the fact and law, contrary to the Due Process clause of the Fifth Amendment to the Constitution.

As fully disclosed by the Court's opinion, this case is before the Court on the petition for review, by certiorari, of the judgment of the Circuit Court of Appeals for the Eighth Circuit, which affirmed the judgment of the District Court for the Eastern District of Missouri denying petitioner's application for leave to file his intervening petition in the Wabash receivership proceedings. The application to intervene was filed in the District Court on January 26, 1938; the petition of intervention referred to was for an order of court discharging the receivers and dismissing the receivership suit; declaring plaintiff's personal injury judgment claim to be preferential and directing the payment thereof from the assets of the receivership estate, and for other relief. Manifestly, the primary object of the intervention was to secure the payment of petitioner's judgment claim against the Wabash Railway Company. The District Court denied petitioner's application for leave to intervene on August 31, 1938, and on petitioner's appeal to the Court of Appeals for the Eighth Circuit the judgment of the District Court was affirmed by an opinion dated May 13, 1939. Thereafter, on July 26, 1939, petitioner filed his petition to this Court for a review of the judgment of the Court of Appeals, and on October 9, 1939, this Court granted certiorari "limited to the question of the right of the petitioner to intervene in order to assert priority."

While petitioner's petition for certiorari was pending in this court Congress passed an Act, approved August 11, 1939, amending Subsection (n) of Section 77 of the Bankruptcy Act, the effect of which was to extend the provisions of that subsection to equity receivership of railroad corporations now or hereafter pending in any court of the United States. Following the approval of that mandatory Act petitioner filed a supplemental petition for review in which he called the Court's attention to the provisions of that Act, and asserted, in effect, that even though prior to that amendment his right to intervene was discretionary with the lower court, his right of intervention had become absolute by virtue of the provisions of said Act; and, as stated, this Court granted the petition, limited as hereinbefore mentioned as to the scope of the review. On that state of the record there was no question before the Court except the single question of law, whether, under the provisions of said Act of August 11, 1939, petitioner had the right to intervene in the District Court proceeding "in order to assert priority." No facts bearing upon the existence or rights of other judgment creditors of the Wabash Company, as shown by the records of the receivership proceedings in the District Court, were, or could be, brought before this Court for consideration or determination if due regard was to be observed in respect to the limitation contained in the order granting the right of review.

These respondents, as receivers of the Wabash Railway Company, conceive it to be their right and duty to speak and act for the best interests of all creditors of the insolvent Railway Company, who, in due course, have filed their claims in the receivership proceedings and had them allowed as judgments against the assets of the receivership estate long prior to the enactment of the said Act of August 11, 1939 (In re Mullen, 101 Fed. 413; In re Economical Printing Company, 110 Fed. 514).

We therefore urge upon the Court the claims of the other judgment creditors of their constitutional right to be heard upon the question whether the application of the provisions of the Act of August 11, 1939, to equity receiverships of railroad corporations now pending in the courts of the United States will not substantially impair their vested property rights as judgment lien creditors of the insolvent Railway Company in violation of the due process clause of the Fifth Amendment to the Constitution; and to that end to further urge that this Court modify its judgment entered herein on January 29, 1940, by vacating the judgment of the Court of Appeals entered in this cause (103 Fed. [2nd] 996) and remanding the cause to the District Court with direction to allow petitioner to intervene in the Wabash receivership proceedings for the purpose of asserting priority.

In reaching a conclusion upon the foregoing request of these respondents we urge the Court to give due consideration to the following facts which appear of record in the said receivership proceedings in the District Court, namely:

(a) Approximately 125 creditors of the Wabash Company filed their claims in the receivership proceeding, each of which had been duly heard and allowed as judgments in favor of said claimants, respectively, and against Wabash Railway Company, many months prior to the enactment approved August 11, 1939. Under the well-settled law of the State of Missouri the filing and allowance of a creditor's claim in an insolvency proceeding determines his status to be that of a judgment creditor (Coleman v. Hagey, 252 Mo. 102, 128, 158 S. W. 829; Cf. Erie Railroad v. Tompkins, 304 U. S. 64) and by virtue of Sections 1103, 1104 and 2841, Revised Statutes of Missouri 1929, and Section 812 of Title 28 U. S. C. A., United States Statutes, each of said judgment creditors became vested with a judgment lien upon all of the railroads and property of the Railway Com-

pany located within the territorial jurisdiction of the District Court of the United States for the Eastern District of Missouri. And it seems to be well settled that judgment liens, mortgage liens, and other statutory liens are vested property rights entitled to the protection of the due process clause of the Fifth Amendment to the Constitution (Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555; Ginsberg v. Lindel [C. C. A. 8], 107 Fed. [2nd] 721).

The aggregate amount of the other judgment creditor claims hereinabove mentioned is approximately $246,000. In addition to this class of claims there are now pending before the District Court twenty claims wherein the respective claimants have heretofore recovered judgments against the Railway Company for damages for personal injuries or death suffered while in the employ of the Railway Company, and each of these claimants is asserting priority under the said Act of August 11, 1939. Certain of the claimants last mentioned have petitioned the Court for orders directing the payment of the claims, and the other judgment creditors hereinbefore mentioned have filed answer to those petitions, through these respondents, asserting their claims as judgment lien creditors, and that priority of payment, from the assets of the insolvent railway corporation, of the employe personal injury judgment claims will directly and substantially impair their constitutional rights in the respects herein indicated by decreasing or diluting pro tanto the assets of the receivership estate which otherwise would be distributable pro rata among all general creditors in accordance with well-recognized principles of equity.

It, therefore, will be observed that if the judgment of this Court entered herein on January 29, 1940, to the effect that the judgment of the Circuit Court of Appeals be vacated and the cause remanded to the District Court with directions to allow petitioner's claims in accordance with the amendatory Act of August 11, 1939, without further

hearing will necessarily deprive other judgment creditors whose claims do not fall within that statutory provision of all opportunity to be heard upon their claim that such interpretation of the Act of August 11, 1939, will impair their vested rights in the assets of the receivership estate which became vested long prior to the effective date of that Act.

It may readily be conceded "that the reasonable classification of claims as entitled to priority because of superior equities" may be the subject of determination by Congress in providing for the distribution of assets in bankruptcy proceedings, but it is equally true that when Congress undertakes to provide by statutory provision for the distribution of the assets of bankrupt estates it must act within the limits prescribed by the Constitution (Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555; Re Tennessee Publishing Company, 81 Fed. [2d] 463, 299 U. S. 18; Ginsberg v. Lindel [C. C. A. 8], 107 Fed. [2d] 721).

This limitation upon the power of Congress was very clearly recognized in the case of Kuehner v. Irving Trust Company, 299 U. S. 445, cited by the Court in the course of its opinion in this case. In that case one of the questions before the Court was whether it is within the power of Congress to provide by statute the limits of the provability in bankruptcy of the claim of a landlord for rentals covering the unexpired portion of the term of a lease, terminated by the bankruptcy of the lessee. In sustaining the power of Congress this Court was careful to point out the distinction between a bankruptcy statute which limited the remedy of a claimant under a contract and a claim for a debt secured by a mortgage or other lien. At page 451 the Court said:

> "Does the Act offend the due process guaranty by destruction of rights conferred by the petitioners' contract? They affirm that it does, not merely by impairing those rights but by direct taking pro tanto of

all remedies for their enforcement and, to that extent, of the contract itself. Conceding they have no lien upon, or property right in, the debtor's assets, such as was the subject of decision in Louisville Joint Stock Land Bank v. Radford, supra, they maintain that the Fifth Amendment assures them some effective procedure for the enforcement of the obligation of their contract; that the debtor's assets are a trust fund for creditors which cannot be invaded for the benefit of stockholders. As pointed out in the case last cited there is, as respects the exertion of the bankruptcy power, a significant difference between a property interest and a contract, since the Constitution does not forbid impairment of the obligation of the latter."

The question may be asked, What are the vested rights of the judgment lien creditors of the insolvent Railway Company whose claims do not come within the provisions of the Act of August 11, 1939? As judgment lien creditors we think the answer given by this Court in the Louisville Bank case, supra, is equally applicable as the answer to the question here suggested.

Referring to the controlling purpose of the Frazier-Lemke Act, Mr. Justice Brandeis, speaking for the Court, said (295 U. S. 555, l. c. 594):

"Its avowed object is to take from the mortgagee rights in the specific property held as security; and to that end 'to scale down the indebtedness' to the present value of the property. As here applied it has taken from the Bank the following property rights recognized by the Law of Kentucky:

"1. The right to retain the lien until the indebtedness thereby secured is paid.

"2. The right to realize upon the security by a judicial public sale.

"3. The right to determine when such sale shall be held, subject only to the discretion of the court.

"4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

"5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

See, also, the answer made to this question by the Court of Appeals for the Sixth Circuit in Re Tennessee Publishing Co., 81 Fed. (2d) 463, at page 463, 299 U. S. 18.

(b) The record in the District Court will further show that the receivership estate is without funds to pay the claims against the Wabash Company falling within the provisions of the said Act of August 11, 1939, as an operating expense of that Company, and therefore the assumption must be that claims of that class must be taken care of through reorganization.

II.

Because the judgment of this Court, in directing that the judgment of the Court of Appeals for the Eighth Circuit be vacated and that the case be remanded to the District Court with directions to allow petitioner's claim in accordance with the provisions of the amendatory statute, cannot, in the very nature of the case, end this litigation, for it is inevitable that as soon as the mandate on the present judgment of this Court is filed in the District Court the question as to the obligation of these respondent receivers to pay interest upon petitioner's judgment will arise, just as that question has already arisen in connec-

tion with other claims of like character now pending in the District Court. According to the record in this case petitioner's judgment was obtained on February 13, 1931 (Rec. 35). The statutes of Missouri allow interest at the rate of six per cent (6%) per annum on judgments obtained in the courts of that state (Section 2841, R. S. Mo. 1929), and one of the further questions to be decided by the District Court will be (a) whether these respondents are further obligated to pay interest upon petitioner's judgment from the date of rendition thereof in the state court to date of payment, or (b) whether, since petitioner's judgment claim did not become one of preferential character, entitled to priority of payment, until the approval of the amendatory Act of Section 77 (n) of the Bankruptcy Act on August 11, 1939, is petitioner, in any event, entitled to be paid interest only from that date?

Any judgment of the District Court allowing interest on petitioner's judgment claim, and on other judgment claims of like character, will likewise operate to further reduce the amount and value of the assets of the estate of the insolvent Railway which otherwise would be distributable pro rata among all general judgment creditors; and, for the reasons hereinabove set forth, those other judgment creditors are clearly entitled to be heard upon all of these questions which so directly affect their vested property rights.

III.

Respondents further assert, on behalf of the other lien creditors to whom we have hereinbefore referred, that the application of the provision of the amendatory Act of August 11, 1939, retrospectively to equity receiverships of railroad corporations now pending in courts of the United States is violative of their rights under the Tenth Amendment to the Constitution.

Apparently the Court, by its judgment herein of January 29, 1940, has determined this question adversely to the claim asserted by said judgment creditors, and the point we now urge is that such determination was made by this Court without any opportunity of said judgment creditors being heard, and without consideration of their inability to be heard upon the record which was before the Court, with scope of the review limited, by express order of the Court, to the question of petitioner's right to intervene in order to assert priority. We, therefore, urge upon the Court that its opinion of January 29, 1940, be so modified as to leave open for later consideration, if and when presented upon a proper record, the question whether the application of the Act of August 11, 1939, to equity receiverships of railroad corporations **now** pending in the courts of the United States will be in violation of their vested property rights as judgment lien creditors of the insolvent Railway Company, although of a class falling without the provisions of said amendatory Act.

## CONCLUSION.

Wherefore, for the several reasons hereinbefore mentioned, these respondents respectfully pray that the opinion and judgment of this Court in this cause, entered January 29, 1940, be so modified as to limit the direction to the District Court to the vacation of its judgment entered on August 31, 1938, denying petitioner's application for intervention and, in lieu thereof, to grant petitioner's application for leave to intervene in order to assert priority of his claim and for the payment thereof as an operating expense of the defendant Wabash Railway Company; or, in the alternative, that the Court grant a rehearing of this cause with the right of all parties hereto (including general creditors of Wabash Railway Company whose judg-

ment claims do not come within the provisions of said Act of August 11, 1939) to be heard, and with the further right of any party to this cause to file with the clerk of this court, as a part of the record in this cause, 40 printed copies, the original of which shall be duly certified by the clerk of the District Court, of such parts of the record of the Wabash receivership proceeding pending in said District Court under the title of Chase National Bank of the City of New York, Trustee, Complainant, v. Wabash Railway Company et al., Defendants, Consolidated Cause In Equity 12,099, as may be deemed material to the issues proposed to be urged upon this Court upon rehearing.

Respectfully submitted,

FRANK C. NICODEMUS, JR.,
HOMER HALL,
NAT S. BROWN,
Counsel for Respondents, Receivers of Wabash Railway Company.

The undersigned, one of the counsel for respondents, Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, hereby certifies that the foregoing petition for modification of the judgment entered herein, or, as an alternative, for rehearing, is not interposed for delay, but is presented in good faith, and believed to be meritorious.

Homer Hall,
Of Counsel for said Respondents.

# SUPREME COURT OF THE UNITED STATES.

No. 230.—October Term, 1939.

Peter J. Carpenter, Petitioner,
*vs.*
Wabash Railway Company, Frank C. Nicodemus, Jr., Norman B. Pitcairn, Receivers, etc., et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 29, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

In February, 1931, petitioner recovered a judgment in the state court of Missouri for $15,000 against the Wabash Railway Company for personal injuries sustained in the course of his employment by that Company. On appeal, the judgment reduced to $10,000 was affirmed.

In December, 1931, on a complaint in equity brought by a creditor of the Wabash Railway Company in the federal court in Missouri, setting forth its financial difficulties and that its undisputed liabilities exceeded the actual value of its assets, receivers were appointed. Suits brought by mortgage trustees were consolidated with the first suit. A special master was appointed to take proof of claims and it appears that in January, 1936, the master allowed petitioner's claim as an unsecured claim without lien or priority.

In January, 1938, petitioner asked leave to file a petition seeking termination of the receivership on various grounds not important here. Among other things, petitioner then alleged that the master's ruling was erroneous and that the claim was entitled to priority. In denying that petition, the District Court considered this contention and held that the "status and classification of petioner's claim as an unsecured claim which is not entitled to any lien or priority of payment over any other unsecured claim" had been "correctly and finally determined in this cause" and that petitioner was "estopped from asserting a claim for preference and priority of payment". The Circuit Court of Appeals affirmed the decree of the District Court and in doing so passed upon that

question. The court said that no statute of Missouri and no decisions of its courts had been shown which provided or held that claims for personal injuries by employees were entitled to priority as operating expenses. Considering the contention of petitioner that the Wabash Railway Company was an Indiana corporation operating in that State and in Ohio and that the laws of those States accorded priority to his claim, the court thought that, even if so, "that situation can have no effect upon the operation and effect of this Missouri judgment". The court also observed that while by subsection (n) of Section 77 of the Bankruptcy Act claims for personal injuries to employees of a railroad corporation are entitled to priority, that provision applied expressly to proceedings in bankruptcy and the present case at this stage is an equity receivership. And, apart from that, the court considered petitioner foreclosed from asserting such rights in this suit, approving the ruling of the District Court in that respect. 103 F. (2d) 996.

Petition for certiorari was filed on July 26, 1939. Subsequently, by Act of Congress approved August 11, 1939, subsection (n) of Section 77 of the Bankruptcy Act was amended so as to apply to equity receiverships and thus to read as follows:

"In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustees appointed pursuant to this section, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad".

Petitioner then presented a supplemental brief in support of his application for certiorari, directing our attention to this statute, and in view of the importance of the question raised by the amendment, we granted certiorari, limited to the question of the right of the petitioner to intervene in order to assert priority. October 9, 1939.

For the present purpose, we may assume, without deciding, that the determination of the court below was correct upon the record before it and in the light of the law as it then stood. But it is our duty to consider the amended statute and to decide the question in

harmony with its provisions, if found to be applicable. The controlling rule was thus stated by Chief Justice Marshall in *United States* v. *Schooner Peggy*, 1 Cranch, 103, 110:

"It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside".

See, also, *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 120; *Crozier* v. *Krupp*, 224 U. S. 290, 302; *Gulf, Colorado & Santa Fe Rwy. Co.* v. *Dennis*, 224 U. S. 503, 506; *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21.

We are of the opinion that the amended statute is applicable to this proceeding. The statute applies to "equity receiverships of railroad corporations now . . . pending in any court of the United States". This is such a case. The statute applies to "claims for personal injuries to employees of a railroad corporation". This is such a claim. The statute says that a claim of that sort "shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad". This is a direct requirement governing the action of the court in this cause.

We have no doubt that Congress has constitutional power to impose this requirement. We have held that earnings, while a railroad is in possession of the court and operated by its receivers, "are not necessarily and exclusively the property of the mortgagees" but are subject to the payment of claims which have superior equities as these may be found to exist. *Fosdick* v. *Schall*, 99 U. S. 235; *Hale* v. *Frost*, 99 U. S. 389, 392. Claims having such equities may be accorded priority in payment although they arose prior to the receivership. *Miltenberger* v. *Logansport Railway Co.*, 106 U. S. 286; *Burnham* v. *Bowen*, 111 U. S. 776; *Union Trust Co.* v. *Illinois Midland Rwy. Co.*, 117 U. S. 434. It is manfiest that the reasonable classification of claims as entitled to priority because of superior equities may be the subject of determination by Congress in providing for the distribution of assets in bankruptcy proceed-

ings. See *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 451, 452. In this view, the provision of subsection (n) of Section 77 of the Bankruptcy Act, as it stood prior to the amendment of August 11, 1939, was sustained by the Circuit Court of Appeals of the Seventh Circuit in *Wise* v. *Chicago, R. I. & P. Rwy. Co.* (90 F. (2d) 312) with respect to certain unsecured surety bonds, and by the Circuit Court of Appeals of the Eighth Circuit with respect to claims for injuries to railroad employees. *Central Hanover Bank & Trust Co.* v. *Williams*, 95 F. (2d) 210; *Thompson* v. *Siratt*, 95 F. (2d) 214.

We see no ground for a different conclusion with respect to the power of Congress to enact the amendment in relation to the distribution of assets in the case of an equity receivership. And the fact that the provision as to the latter is included in a section of the bankruptcy statute does not derogate from its controlling authority as an expression of the will of Congress. The Circuit Court of Appeals of the Eighth Circuit has recently held this provision as to equity receiverships to be applicable and valid in relation to claims for personal injuries sustained by employees of this railroad corporation. *American Surety Co.* v. *Wabash Railway Co.*, 107 F. (2d) 685. We think the conclusion is sound.

It is urged in opposition to petitioner's contention that unless and until the District Court upon proper application has passed upon the question as to extending the time for filing petitioner's claim under the amended statute, the question of its priority is not properly before this Court; that petitioner has not asked the District Court to pass upon that question in the light of the amended statute. But when the Act of August 11, 1939, was passed, the case was before this Court upon petition for certiorari, which has been granted, and in order properly to dispose of the case we are bound, as already stated, to consider and apply the amended statute. Then, the argument is pressed that, at least, we should remand the case to the District Court in order that it may determine whether the claim for preference and payment under the amendment should be entertained. It is said that such applications may be considered in the light of existing circumstances, or of the stage which the proceedings have reached, as, for example, in relation to steps which may have been taken in carrying out plans for reorganization.

We find no provision in the statute for the exercise of such a discretion by the District Court where the proceedings to which the statute refers are pending and the claims are within the statute.

There is no suggestion that the present proceeding had been terminated prior to the enactment of the amendment or that it is not now pending. The statute is explicit and mandatory and the District Court has no discretion to act contrary to its terms. The statute says that the described claims "shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad". Petitioner's claim is within the class described and should be preferred and paid accordingly.

The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court with directions to allow petitioner's claim in accordance with the statutory provision.

*It is so ordered.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*